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CASES ON TORTS

CASES ON TORTS

BY

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TO ACCOMPANY

“THE LAW OF TORTS”

BY MELVILLE M. BIGELOW, LL. D.

BOSTON

LITTLE, BROWN, AND COMPANY

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Frank Leslie Simpson
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1908

NOTE.

IN preparing the present volume of Cases on Torts, the editor has had two principal objects in mind.

First, To collect a set of cases to be studied and analyzed carefully.

Second, To furnish an adequate volume of illustrative cases to accompany Prof. Melville M. Bigelow's valuable work, "The Law of Torts," eighth edition.

In selecting cases, three rules of usefulness of cases for study and illustration have been the guides.

First, no case is reported in which the facts are not fully stated; no attempt has, however, been made to reduce the facts to the lowest material terms. Not the least profit which the student obtains from the study of a case lies in the practice of eliminating immaterial matter and in determining the material facts upon which the decision is made.

Second, the cases selected are those in which the facts represent ordinary controversies, such as are likely to arise frequently.

Third, leading cases and those indicating recent development of the law, following modern social, economic, and political movements, have been chosen; especially is this true of the subject of Interference with Contract.

The order followed, after the Introduction, is that of Dr. Bigelow's text, eighth edition; Part I including torts, the unlawfulness of which turns upon the culpability of mind of the defendant, — negligence, or culpable accident, being included herein; Part II including those torts, the unlawfulness of which turns upon the nature of the act done, irrespective of the state of mind or due care of the defendant; Part III illustrating the common aspects of all torts. The purpose in this has been to emphasize the unity of the Law of Torts.

A number of cases in Bigelow's "Cases on Torts" have been used in the present work, but it has been found necessary in re-

spect to some of the specific torts greatly to increase the number of cases reported, and in respect to others to select almost entirely new cases. The former is true of Deceit, Slander and Libel, Trespass, Conversion and Negligence.

The latter is true of Unfair Competition, Procuring Breach of Contract, and Procuring Refusal to Contract.

Indeed such has been the development of these last mentioned subjects, that only three of the cases reported in this volume had been decided when the edition of Dr. Bigelow's cases was published.

The Introduction and the chapter on Common Aspects are entirely new.

F. L. S.

Boston, *October 1, 1908.*

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CASES ON TORTS.

INTRODUCTION

DAWE *v.* MORRIS.

Supreme Court of Massachusetts, May, 1889. 149 Mass. 188.

TORT. The first count of the declaration was as follows: "And the plaintiff says that the defendant, in order to induce the plaintiff to make a contract with the Florida Midland Railway Company for the building of about thirty miles of the Florida Midland Railway in Florida, falsely represented that he, said Morris, and one Page had purchased certain rails sufficient to build a certain number of miles of railroad, to wit, thirty miles, at a certain sum per ton, to wit, the sum of eighteen dollars less freight to New York, and that, if said plaintiff would make a contract with said company for building said part of said railway, they, said defendant and said Page, would sell those said rails already purchased by them to the plaintiff at said price per ton; and the plaintiff, believing said representations were true, was thereby induced to enter into a contract, and did enter into a contract with said company for the construction of about thirty miles of said railroad, and entered upon the performance of said contract with said railway company; and said Page and said defendant had not then purchased said rails, or any part of them, which the defendant then knew, and therefore did not sell, and did not intend to sell, said rails already purchased by them to the plaintiff; and by reason of the said contract made by the plaintiff with said railway company, which said contract said plaintiff was induced to enter into by reason of the false and fraudulent representations of the defendant as aforesaid, said plaintiff was obliged to purchase, and did purchase, a large number of rails, to wit, rails sufficient to build about twenty-two miles of railroad, and to pay, and did pay, therefor a large sum, to wit, the sum of forty dollars per ton, and was also by reason thereof obliged to purchase, and did purchase, a large number of rails, to wit, rails sufficient to build about eight miles of railroad, and to pay therefor, and did pay therefor, a large sum, to wit, the sum of twenty-four dollars per ton; that said plaintiff, relying upon the representations of the defendant as aforesaid, had entered upon the performance of his said contract with said railway company, and that by the reason of the failure of said defendant to furnish said

rails, said plaintiff was greatly damaged before he discovered that said defendant had not purchased said rails."

The second count of the declaration alleged that the defendant had "converted to his own use a number of bonds, to wit, thirty-three, of the Florida Midland Railway Company, of the par value of one thousand dollars each, the said bonds being the property of the plaintiff."

The defendant demurred to the first count, on the ground that the declaration did not set forth a legal cause of action.

The Superior Court sustained the demurrer, and ordered judgment for the defendant; and the plaintiff appealed to this court.

DEVENS, J. The alleged misrepresentations of the defendant, by which the plaintiff avers that he was induced to enter into a contract for building thirty miles of the Florida Midland Railway, are that the defendant had purchased a certain quantity of rails at a certain price, and that he would sell those rails to the plaintiff at the same price if he would make such contract. The plaintiff's declaration alleges that the defendant had not then purchased the rails, and did not sell, and did not intend to sell, any rails so purchased to the plaintiff; and that by reason of the contract into which the plaintiff was induced to enter, he was obliged to purchase a large number of rails at a much higher price than that named by the defendant, to his great injury. If the formalities required by law in order that contracts for the sale and delivery of goods of the value here in question had been complied with, that these facts would constitute a contract upon a valuable consideration, will not be questioned. The plaintiff does not seek to recover upon this contract, but in an action of tort in the nature of deceit, because he was induced to enter into the contract with the Florida Railway Company by reason of the representations above set forth.

A representation, in order that, if material and false, it may form the ground of an action where one has been induced to act by reason thereof, should be one of some existing fact. A statement promissory in its character that one will thereafter sell goods at a particular price or time, will pay money, or do any similar thing, or any assurance as to what shall thereafter be done, or as to any further event, is not properly a representation, but a contract, for the violation of which a remedy is to be sought by action thereon. The statement by the defendant that he would thereafter sell rails at a particular price if the plaintiff would contract with the railway company was a promise, the breach of which has occasioned the injury to the plaintiff. *Knowlton v. Keenan*, 146 Mass. 86.

The plaintiff contends that, even if this is so, the representation that the defendant had thus purchased the rails at the price named was material and false; but if the allegation that the defendant had purchased the rails be separated from that of the promise to sell them to the plaintiff, it is seen at once to be quite unimportant and im-

material. Had the defendant actually sold, or had he been ready to sell, the rails at the time and price he promised that he would, no action could have been maintained by reason of any false representation that he had purchased them when he made his promise, and no possible injury could thereby have resulted to the plaintiff.

It is urged that, independent of any promise to sell to him, if the plaintiff had believed that the defendant had purchased rails at the price at which he said he had purchased them, the plaintiff might thus have been induced to believe that he himself could thereafter purchase them at the same price. But the injury from a false representation must be direct, and the probability or possibility that, because the defendant had purchased at a particular price, the plaintiff would be able, or might believe himself to be able, to do so also, is too remote to afford any ground for action.

It must be shown, not only that the defendant has committed a tort and that the plaintiff has sustained damage, but that the damage is the clear and necessary consequence of the tort, and such as can be clearly defined and ascertained. *Lamb v. Stone*,¹ 11 Pick. 527. *Bradley v. Fuller*, 118 Mass. 239. Quite a different case would be presented if the defendant had falsely represented to the plaintiff, if unskilled in the price of rails, what their market value then was, and what was the price at which they could then be purchased.

It is also said, that if the plaintiff believed that the defendant had actually purchased the rails, at the time of the transaction, and that if he knew that the completion of the railroad was of vital importance to the interests of the defendant, he would more readily have confided in the defendant's promise to sell them, and thus that this representation was material. But in order that a false representation may form the foundation of an action of deceit, it must be as to some subject material to the contract itself. If it merely affect the probability that it will be kept, it is collateral to it. "Representations as to matters which are merely collateral, and do not constitute essential elements of the contract into which the plaintiff is induced to enter, are not sufficient." *Hedden v. Griffin*, 136 Mass. 229.

Whether the allegation as to the purchase of the rails by the defendant was material was a question for the court, which was to construe the contract, and determine its legal effect on the duties and liabilities of the parties. It was for it to determine (there being on the declaration of the plaintiff no dispute as to the facts) whether the alleged misrepresentations were material, and such as would invalidate the contract or form the foundation of an action of tort. *Penn Ins. Co. v. Crane*, 134 Mass. 56.

The plaintiff further contends that, as when goods have been obtained under the form of a purchase with the intent not to pay for them, the seller may, on discovery of this, rescind the contract

¹ Post, p. 20.

and repossess himself of the goods as against the purchaser or any one obtaining the goods from him with notice or without consideration, an action of tort should be maintained on an unfulfilled promise which, at the time of making, the promisor intended not to perform, by reason of which non-performance the plaintiff has suffered injury in having been induced to enter into a contract which depended for its successful and profitable performance upon the performance by the defendant of his promise.

Assuming that the plaintiff's declaration enables him to raise this question, which may be doubted, as the averment that "said defendant had not then purchased said rails, or any part of them, which the defendant then knew, and therefore did not sell, and did not intend to sell, said rails already purchased by them to the plaintiff," is not an averment that the defendant intended not to perform his contract, there is an obvious difference between the case where a contract is rescinded, and thus ceases to exist, and one in which the injury results from the non-performance of that which it is the duty of the defendant to perform, and where there is no other wrong than such non-performance. To term this a tort would be to confound a cause of action in contract with one in tort, and would violate the policy of the statute of frauds by relieving a party from the necessity of observing those statutory formalities which are necessary to the validity of certain executory contracts.

It was not disputed that the plaintiff's declaration sets forth in the second count a good cause of action. The result is, that as to the first count the entry must be,

Judgment for the defendant affirmed.

BIGBY v. UNITED STATES.

Supreme Court of United States, October, 1902. 188 U. S. 400.

BIGBY, the plaintiff in error, claimed in his petition to have been damaged to the extent of ten thousand dollars on account of certain personal injuries received by him while entering an elevator placed by the United States in its court-house and post-office building in the city of Brooklyn, and asked judgment for that sum against the Government.

The petition was demurred to upon three grounds, namely, that the court had no jurisdiction of the person of the defendant, or of the subject of the action, and that the petition did not state facts sufficient to constitute a cause of action against the United States.

The demurrer was sustained by the Circuit Court on each of the grounds specified, and so far as it was sustained upon the ground

that the petition did not state a cause of action, it was sustained because the action was not authorized by the act of Congress known as the Tucker Act, approved March 3, 1887, c. 359, and entitled "An act to provide for the bringing of suits against the Government of the United States." 24 Stat. 505. The action was accordingly dismissed. 103 Fed. Rep. 597.

The specific allegations of the petition are —

That the United States is a corporation created by the Constitution with its principal office in Washington, and within the meaning of the New York Code of Civil Procedure is a foreign corporation;

That on or about November 27, 1899, the petitioner, while on his way to the office of the Marshal of the United States for the Eastern District of New York, and at the request of the United States, and of its officers, employees and duly authorized agents, each acting within the scope of his authority, entered into a passenger elevator in the United States court-house and post-office building in Brooklyn, which building and elevator was owned and controlled by the United States, and was designed and intended by it for the use of persons on their way to the office of its said Marshal;

That the United States "then and there entered into an implied contract" with the petitioner, "wherein and whereby, for a sufficient valuable consideration, it agreed to carry your petitioner safely, to operate said elevator with due care, and to employ for the purposes of the operation of said elevator a competent and experienced person;"

That in "violation of said contract, the United States failed to carry the petitioner safely, or to operate the elevator with due care, or to employ for the operation and to put in charge of such elevator a competent and experienced person, and violated its contract with the petitioner in other ways;" and,

That in consequence of said failures, respectively, the petitioner, "while entering the said elevator without negligence on his part was caused to fall and his foot, ankle and leg were crushed between said elevator and the top of the entrance into the elevator shaft or a projection in the shaft of said elevator or in some other manner and the back of your petitioner and other parts of the body of your petitioner were also consequently injured and your petitioner consequently suffered a laceration of the ligaments of his ankle and he consequently was caused much bodily and mental pain."

MR. JUSTICE HARLAN. This being an action against the United States, the authority of the Circuit Court to take cognizance of it depends upon the construction of the above act of March 3, 1887. 24 Stat. 505.

By that act it is provided that the Court of Claims shall have jurisdiction to hear and determine "all claims founded upon the Constitution of the United States or any law of Congress, except for

pensions, or upon any regulation of an Executive Department or upon any contract, expressed¹ or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: Provided, however, That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same." The act further provided that "the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the Circuit Courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars."

It is clear that the act excludes from judicial cognizance any claim against the United States for damages in a case "sounding in tort." But the contention of the plaintiff is, in substance that although the facts constituting the negligence of which he complains, made a case of tort, he may waive the tort; that his present claim is founded upon an implied contract with the Government, whereby it agreed to carry him safely in its elevator, to operate the elevator with due care, and to employ for the purposes of such carriage a competent and experienced person; and, consequently, that his suit is embraced by the words "upon any contract, express¹ or implied, with the Government of the United States." The contention of the United States is that no such implied contract with the Government arose from the plaintiff's entering or attempting to enter and use the elevator in question, and that the claim is distinctly for damages in a case "sounding in tort," of which the act of Congress did not authorize the Circuit Court to take cognizance.

Can the plaintiff's cause of action be regarded as founded upon implied contract with the Government, within the meaning of the act of 1887?

The precise question thus presented has not been determined by this court. But former decisions may be consulted in order to ascertain whether this suit is embraced by the words, in that act, "upon any contract, express or implied, with the Government of the United States." Do those words include an action against the United States to recover damages for personal injuries caused by the negligent management of an elevator erected and maintained by it in one of its court-house and post-office buildings?

¹ *Id.*

[After considering the cases of *Gibbons v. United States*, 8 Wall. 269, *Langford v. United States*, 101 U. S. 341, *Hill v. United States*, 149 U. S. 593, *Robertson v. Sichel*, 127 U. S. 507, *Schillinger v. United States*, 155 U. S. 163, the court continued:]

It thus appears that the court has steadily adhered to the general rule that, without its consent given in some act of Congress, the Government is not liable to be sued for the torts, misconduct, misfeasances or laches of its officers or employees. There is no reason to suppose that Congress has intended to change or modify that rule. On the contrary, such liability to suit is expressly excluded by the act of 1887.

Cases of this kind are to be distinguished from those in which private property was taken or used by the officers of the Government with the consent of the owner or under circumstances showing that the title or right of the owner was recognized or admitted. As, in *United States v. Russell*, 13 Wall. 623, which was an action to recover for the use of certain steamers used in the business of the Government pursuant to an understanding with the owner that he should be compensated; or, in *United States v. Great Falls Manufacturing Company*, 112 U. S. 645, in which it appeared that certain private property was appropriated by officers of the Government for public use, pursuant to an act of Congress, the title of the owner being recognized or not disputed; or, in *United States v. Palmer*, 128 U. S. 262, 269, which was an action to recover for the use of a patent which the Government was invited by the patentee to use. In all such cases the law implies a meeting of the minds of the parties, and an agreement to pay for that which was used for the Government, no dispute existing as to the title to the property used. The important fact in each of those cases was that the officers who appropriated and used the property of others were authorized to do so, and hence the implied contract that the Government would pay for such use.

But, as we have seen, the plaintiff contends that when he entered or attempted to enter the elevator the Government must be deemed to have contracted that its employee in charge of it would use due care so as not to needlessly injure him. In other words—for it comes to that—by the mere construction and maintenance of such elevator the Government, contrary to its established policy, impliedly agreed to be responsible for the torts of an employee having charge of the elevator, if, by his negligence, injury came to one using it. We find no authority for this position in any act of Congress, and nothing short of an act of Congress can make the United States responsible for a personal injury done to the citizen by one of its employees who, while discharging his duties, fails to exercise such care and diligence as a proper regard to the rights of others required. “Causing harm by negligence is a tort.” One of the definitions of a tort is “an act or omission causing harm which the person so acting

or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented." Pollock on Torts, 1, 19.¹ The elevator in question was erected in order to facilitate the transaction of the public business, and also, it may be assumed, for the convenience and comfort of those who might choose to use it when going to a room in the court-house and post-office building occupied by public officers, and not pursuant to any agreement, express or implied, between the United States and the general public, or under any agreement between the United States and the individual person who might seek to use it. No one was compelled or required to use it, and no officer in charge of the building had any authority to say that a person using it could sue the Government if he was injured by reason of the want of due care on the part of the employee operating it. No officer had authority to make an express contract to that effect and no contract of that kind could be implied merely from the Government's ownership of the elevator and from the negligence of its employee. The facts alleged show a case in which the plaintiff was injured by reason of the negligence of the manager of the elevator. It is therefore a case of pure tort on the part of such manager for which he could be sued. It is a case "sounding in tort," because it had its origin in and is founded on the wrongful and negligent act of the elevator manager. There is in it no element of contract as between the plaintiff and the Government; for, as we have said, no one was authorized to put upon the Government a liability for damages arising from the wrongful, tortious act of its employee. The plaintiff therefore cannot by the device of waiving the tort committed by the elevator operator make a case against the Government of implied contract. A party may in some cases waive a tort, that is, he may forbear to sue in tort, and sue in contract, where the matter out of which his claim arises has in it the elements both of contract and tort. But it has been well said that "a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them, upon which assumption can be maintained." *Cooper v. Cooper*, 147 Mass. 370, 373. If the plaintiff could sue the elevator employee upon an implied contract that due care should be observed by him in managing the elevator, it does not follow that he could sue the Government upon implied contract. For under existing legislation no relation of contract could rise between the Government and those who chose to use its elevator. It is easy to perceive how disastrous to the operations of the Government would be a rule under which it could be sued for torts committed by its agents and employees in the management of its property. It is for Congress to determine in all such cases what justice requires upon the part of the Government. If any exceptions ought to be made to the general rule it is for Congress to make them.

¹ See Bigelow on Torts, 8th ed., p. 64.

We have not overlooked the allegation in the petition that the plaintiff entered the elevator "at the request of the United States, and of its officers, employees and duly authorized agents, each acting within the scope of his authority." This, we assume, means at most only that the plaintiff entered, or attempted to enter, the elevator with the assent of those who had control of it and of the building in which it was erected. But if more than this was meant to be alleged; if the plaintiff intended to allege an express or affirmative request by officers or agents of the United States, the case would not, in our view, be changed; for the court knows that, without the authority of an act of Congress, no officer or agent of the United States could, in writing or verbally, make the Government liable to suit by reason of the want of due care on the part of those having charge of an elevator in a public building.

We are of opinion that this case is one sounding in tort, within the meaning of the act of 1887, and therefore not maintainable in any court.

The judgment of the Circuit Court dismissing the action for want of jurisdiction is

Affirmed.

BOSTON & WORCESTER RAILROAD CORPORATION *v.*
DANA.

Supreme Court of Massachusetts, March, 1854. 1 Gray, 83.

ASSUMPSIT for money had and received.

There was a verdict for the plaintiffs and the defendant moved for a new trial upon the ground, among others, that the presiding judge had given erroneous instructions to the jury.

The facts are stated in the opinion.

BIGELOW, J. The main objection, raised by the defendant in the present case, which, if well maintained, is fatal to the plaintiffs' action, presents an interesting and important question, hitherto undetermined by any authoritative judgment in the courts of this commonwealth.

The plaintiffs seek to recover in an action of assumpsit a large sum of money alleged by them to have been fraudulently abstracted from their ticket office by the defendant, while he was in their employment as depot-master, having charge of their principal railway station in Boston. In regard to this item of the plaintiffs' claim, the defendant contended at the trial, and requested the judge who presided to instruct the jury, that the plaintiffs were not entitled to recover in this action the money thus taken by the defendant, because their cause of action, if any they had, was suspended, until an indictment

had been found or complaint made against the defendant for larceny. This request was refused, and the jury were instructed, that if the defendant had fraudulently taken and appropriated the plaintiffs' money in the manner alleged, and was thereby guilty of larceny, he would be liable in the present action, although no criminal prosecution had first been instituted therefor. It is upon the correctness of this instruction that the first and main question in the case arises.

The doctrine, that all civil remedies in favor of a party injured by a felony are, as it is said in the earlier authorities, merged in the higher offence against society and public justice, or, according to more recent cases, suspended until after the termination of a criminal prosecution against the offender, is the well settled rule of law in England at this day,¹ and seems to have had its origin there at a period long anterior to the settlement of this country by our English ancestors. *Markham v. Cob, Latch*, 144, and *Noy*, 82. *Dawkes v. Coveleigh, Style*, 346. *Cooper v. Witham*, 1 Sid. 375, and 1 Lev. 247. *Crosby v. Leng*, 12 East, 413. *White v. Spettigue*, 13 M. & W. 603. 1 Chit. Crim. Law, 5.

But although thus recognized and established as a rule of law in the parent country, it does not appear to have been, in the language of our constitution, "adopted, used and approved in the province, colony or state of Massachusetts Bay, and usually practised on in the courts of law." The only recorded trace of its recognition in this commonwealth is found in a note to the case of *Higgins v. Butcher*, Yelv. (Amer. ed.), 90 a, note 2, by which it appears to have been adopted in a case at nisi prius by the late Chief Justice Sewall. The opinion of that learned judge, thus expressed, would certainly be entitled to very great weight, if it were not for the opinion of this court in *Boardman v. Gore*, 15 Mass. 338, in which it is strongly intimated, though not distinctly decided, that the rule had never been recognized in this state, and had no solid foundation, under our laws, in wisdom or sound policy. Under these circumstances, we feel at liberty to regard its adoption or rejection as an open question, to be determined, not so much by authority, as by a consideration of the origin of the rule, the reasons on which it is founded, and its adaptations to our system of jurisprudence.

The source, whence the doctrine took its rise in England, is well known. By the ancient common law, felony was punished by the death of the criminal, and the forfeiture of all his lands and goods to the crown. Inasmuch as an action at law against a person, whose body could not be taken in execution and whose property and effects belonged to the king, would be a useless and fruitless remedy, it was held to be merged in the public offence. Besides, no such remedy in favor of the citizen could be allowed without a direct interference with the royal prerogative. Therefore a party injured by a felony

¹ See Pollock on Torts, 7th ed.; pp. 197-199.

could originally obtain no recompense out of the estate of a felon, nor even the restitution of his own property, except after a conviction of the offender, by a proceeding called an appeal of felony, which was long disused, and wholly abolished by St. 59 Geo. 3, c. 46; or under St. 21 H. 8, c. 11, by which the judges were empowered to grant writs of restitution, if the felon was convicted on the evidence of the party injured or of others by his procurement. 2 Car. & P. 43, note. But these incidents of felony, if they ever existed in this state, were discontinued at a very early period in our colonial history. Forfeiture of lands or goods, on conviction of crime, was rarely, if ever, exacted here; and in many cases, deemed in England to be felonies and punishable with death, a much milder penalty was inflicted by our laws. Consequently the remedies, to which a party injured was entitled in case of felony, were never introduced into our jurisprudence. No one has ever heard of an appeal of felony, or a writ of restitution under St. 21 H. 8, c. 11, in our courts. So far therefore as we know the origin of the rule and the reasons on which it was founded, it would seem very clear that it was never adopted here as part of our common law.

Without regard however to the causes which originated the doctrine, it has been urged with great force and by high authority, that the rule now rests on public policy; 12 East, 413, 414; that the interests of society require, in order to secure the effectual prosecutions of offenders by persons injured, that they should not be permitted to redress their private wrongs, until public justice has been first satisfied by the conviction of felons; that in this way a strong incentive is furnished to the individual to discharge a public duty, by bringing his private interest in aid of its performance, which would be wholly lost, if he were allowed to pursue his remedy before the prosecution and termination of a criminal proceeding. This argument is doubtless entitled to great weight in England, where the mode of prosecuting criminal offences is very different from that adopted with us. It is there the especial duty of every one, against whose person or property a crime has been committed, to trace out the offender, and prosecute him to conviction. In the discharge of this duty, he is often compelled to employ counsel; procure an indictment to be drawn and laid before the grand jury, with the evidence in its support; and if a bill is found, to see that the case on the part of the prosecution is properly conducted before the jury of trials. All this is to be done by the prosecutor at his own cost, unless the court, after the trial, shall deem reimbursement reasonable. 1 Chit. Crim. Law, 9, 825. The whole system of the administration of criminal justice in England is thus made to depend very much upon the vigilance and efforts of private individuals. There is no public officer, appointed by law in each county, as in this commonwealth, to act in behalf of the government in such

cases, and take charge of the prosecution, trial and conviction of offenders against the laws. It is quite obvious that, to render such a system efficacious, it is essential to use means to secure the aid and coöperation of those injured by the commission of crimes, which are not requisite with us. It is to this cause, that the rule in question, as well as many other legal enactments, designed to enforce upon individuals the duty of prosecuting offences, owes its existence in England. But it is hardly possible, under our laws, that any grave offence of the class designated as felonies can escape detection and punishment. The officers of the law, whose province it is to prosecute criminals, require no assistance from persons injured, other than that which a sense of duty, unaided by private interest, would naturally prompt.

On the other hand, in the absence of any reasons, founded on public policy, requiring the recognition of the rule, the expediency of its adoption may well be doubted. If a party is compelled to await the determination of a criminal prosecution before he is permitted to seek his private redress, he certainly has a strong motive to stifle the prosecution and compound with the felon. Nor can it contribute to the purity of the administration of justice, or tend to promote private morality, to suffer a party to set up and maintain in a court of law a defence founded solely upon his own criminal act. The right of every citizen, under our constitution, to obtain justice promptly and without delay, requires that no one should be delayed in obtaining a remedy for a private injury, except in a case of the plainest public necessity. There being no such necessity calling for the adoption of the rule under consideration, we are of opinion that it ought not to be engrafted into our jurisprudence.

We are strengthened in this conclusion by the weight of American authority, and by the fact that in some of the states, where the rule had been established by decisions of the courts, it has been abrogated by legislative enactments. *Pettingill v. Rideout*, 6 N. H. 454. *Cross v. Guthery*, 2 Root, 90. *Piscataqua Bank v. Turnley*, 1 Miles, 312. *Foster v. Commonwealth*, 8 W. & S. 77. *Patton v. Freeman*, Coxe, 113. *Hepburn's case*, 3 Bland, 114. *Allison v. Farmer's Bank of Virginia*, 6 Rand. 223. *White v. Fort*, 3 Hawks, 251. *Robinson v. Culp*, 1 Const. Rep. 231. *Story v. Hammond*, 4 Ohio, 376. *Ballew v. Alexander*, 6 Hump. 433. *Blassingame v. Graves*, 6 B. Monr. 38. Rev. Sts. of N. Y. Part 3, c. 4, s. 2. St. of Maine of 1844, c. 102.

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Judgment on the verdict.

KIRBY *v.* BOYLSTON MARKET ASSOCIATION.

Supreme Court of Massachusetts, November, 1859. 14 Gray, 249.

ACTION of Tort for personal injuries suffered by falling upon the sidewalk on the north side of the defendant's market house in Boston. Trial before Bigelow, J., who reserved the following case for the directions of the full court.

The plaintiff introduced evidence tending to prove the injury and that it occurred on the sidewalk forming part of Boylston Street, a highway in the city of Boston, and paved by order of the city; that the sidewalk was in a dangerous condition from want of repair and from the quantity of snow and ice which had been unlawfully permitted to accumulate thereon, consisting of snow which had naturally fallen there, ice formed from water discharged by the snow and rain, and also ice formed from water discharged by the conductor from the roof of the market house, which discharged upon the sidewalk, without any provision to carry the water off, and from water which, for want of sufficient conductors, overflowed the gutters of the market house. The plaintiff contended that the sidewalk was in a bad condition from all these causes, and that for all of them the defendants were liable, and that his injuries were occasioned by one or more of them.

The defendants contended that even if the above facts were true (which they denied), they were not answerable; and introduced a witness, the superintendent of the building, who testified that all the stalls and cellars forming Boylston Market were leased to various tenants, and that all the rooms in the upper stories were also let, some of them to tenants at will; that the defendants made all repairs outside of the rooms or stalls, and took care of the roof, gutters and conductors of the building; that the outside passage ways and doors were under their control, so far as was necessary in order to make repairs; that they employed a man to open and close the doors of the story used as a market, at hours fixed by the tenants; and that the doors of the upper stories were opened and closed by the tenants of them, who kept the keys.

MERRICK, J. It is undoubtedly a well settled principle of the common law that the occupier, and not the landlord, is bound, as between himself and the public, so far to keep buildings and other structures abutting upon common highways in repair, that they may be safe for the use of travellers thereon; and that such occupier is *prima facie* liable to third persons for damages arising from any defect. *Lowell v. Spaulding*, 4 Cush. 227. *Oakham v. Holbrook*, 11 Cush. 299. *Regina v. Bucknall*, 2 Ld. Raym. 804. *Rich v. Basterfield*, 4 C. B. 783.

But the defendants are not in a situation to avail themselves of that principle in defence of this action. Although all the separate parts of their building, consisting of cellars, stalls and disconnected chambers, were leased either at will or for a term of years to many different tenants, yet the defendants had a general supervision over the whole, and had the entire control of the outside doors and outside passage ways, so far as was necessary to enable them to make all necessary repairs; the obligation to do which rested exclusively on them. They also kept the key of the market room, and opened and closed the doors of it at certain fixed hours, conforming however in respect to the time of doing it to the wishes of the tenants. Under these circumstances there was no such occupancy by the tenants as would cast upon them the obligation of keeping the building in repair, or make them responsible to third persons for damages resulting from its defects; but the liability in that particular still continued to rest upon the owner.

Individuals who sustain injuries or suffer loss and damage peculiar and special to themselves, from nuisance created or obstructions unlawfully placed by another person in a public highway, may maintain an action against him to recover compensation therefor. *Stetson v. Faxon*, 19 Pick. 147. *Smith v. Smith*, 2 Pick. 621. *Dobson v. Blackmore*, 9 Ad. & El. N. R. 991. The defendants therefore are plainly liable to the plaintiff, if they in any way created or caused a public nuisance in the highway adjacent to their estate, by means of which he, while using due care for his own protection and safety, suffered the injury to his person of which he complains. And it makes no difference how or in what manner the nuisance was created, whether it was by removing the snow from their own premises and piling it up in the public street in such an accumulated mass as essentially to interfere with its use and enjoyment, and to impede the public travel, or in any other way or by any other means whatever. The same consequences would follow if they erected their building upon the highway, or constructed it so that it would necessarily be a public nuisance there; or if, having properly and lawfully erected and placed it upon their own land, they suffer and allow it to fall into such waste and decay that it would thereby necessarily become a nuisance and thereby cause an unlawful obstruction to the public travel. In either and all of these cases, they would be liable to prosecution by indictment, and also be responsible to individuals to whom special damage should thereby be occasioned.

But the defendants, as owners and occupants of the land and building abutting upon Boylston Street, are not responsible to individuals for injuries resulting to them from defects and want of repair in the sidewalk, or by means of snow and ice accumulated by natural causes thereon, although, by ordinances of the city, it is made the duty of abutters, under prescribed penalties, to keep

the sidewalks adjoining their estates in good repair, and seasonably to remove all snow and ice therefrom. Such ordinances are valid, and the work which is enforced under them relieves, to the extent of its cost or value, the city from charges which otherwise it would be necessarily, in discharge of its municipal duties, subjected to. *Goddard*, petitioner, 16 Pick. 504. For the city is required to keep all duly established highways within its limits in good repair and clear of snow and ice, so that they shall, at all seasons of the year, be safe and convenient for persons passing and travelling thereon. *Rev. Sts. c. 25, ss. 1, 3, 24. Loker v. Brookline*, 13 Pick. 343. And the city is in no degree exonerated from its obligations in these particulars in consequence of the adoption of ordinances designed and intended effectually to secure the proper application of whatever labor and means are necessary for the accomplishment of that purpose. If therefore there was, at the time when the plaintiff complains that he sustained an injury to his person, any defect or want of repair in the sidewalk, or if it was so incumbered, by operation of natural causes, by snow and ice as to be dangerous, or not reasonably safe and convenient for travellers passing along upon it, their remedy for all damages actually sustained in consequence thereof is exclusively against the inhabitants of the city in their corporate capacity. *St. 1850, c. 5, s. 1.*¹

It is therefore clear that upon these last grounds this action cannot be maintained; but it must stand continued for trial upon the questions of fact whether the defendants by their unlawful acts or their negligence in constructing or maintaining their building, caused or created a public nuisance in Boylston Street, by means of which special damage was done to the plaintiff in the manner complained of in his declaration.

Case to stand for trial.

BOTT v. PRATT.

Supreme Court of Minnesota, April, 1885. 33 Minn. 323.

APPEAL by defendants from an order of the district court for Ramsey County, Wilkin, J., presiding, refusing a new trial, after a verdict of \$950 for plaintiff. The case is stated in the opinion.

VANDERBURGH, J. The charter of the city of St. Paul empowers the city council, by ordinance, to compel persons to fasten their horses or other animals attached to vehicles, while standing in the streets; such ordinance to have the force of law within the municipal jurisdiction, and to be enforced by the proper penalties. In pursuance of this provision the following ordinance was passed, and was in force when the accident out of which this action arose, occurred: "It shall not hereafter be lawful for any teamster or driver or

¹ See *Rev. Laws of Mass., c. 51, § 19.*

owner, or any person or persons having in charge any team attached to any vehicle within the city of St. Paul, to leave the same standing in or along any public street in said city, without being securely hitched or fastened, or without being held by some one securely." The defendants left a team of horses, attached to a wagon loaded with wood, in a public street, standing unhitched, and for the time without being held or in the charge of any one; the driver, defendants' servant, having temporarily left them, to make inquiry in reference to the place of delivery of the wood. In his absence the team started and ran down Wabasha Street, one of the most public thoroughfares in the city, across the bridge over the Mississippi river, and, colliding with the plaintiff's wagon, caused the injury complained of. There was no evidence showing the particular circumstances which caused the horses to take fright and run away. But the plaintiff's case rests upon the facts above stated, which are undisputed.

The questions of fact as to the character and extent of plaintiff's injuries, and whether he was guilty of contributory negligence in the premises, and also whether the fact that the team was left unfastened and unguarded in a public street was the proximate cause of the injury, were settled by the verdict. *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469.

The only question, then, remaining for our consideration, is the question of the liability of the defendants in a civil action for the natural and probable consequences of the unexcused omission of their servant to fasten the team. We say unexcused, because, in view of the language and purpose of the charter and ordinance, it is manifestly no sufficient excuse that the horses were believed to be gentle, and not vicious, and had never been known to run away. If the action were simply an ordinary action for negligence, in the absence of any statutory duty, these circumstances, with others, might have been considered by the jury in determining the question of negligence, — *Griggs v. Fleckenstein*, 14 Minn. 62, — though, in such an action, the fact that the horses ran away, and were not properly hitched, would be evidence of negligence in not fastening them. *Strup v. Edens*, 22 Wis. 432; *Courternier v. Secombe*, 8 Minn. 264. But in refusing defendants' instructions to the jury, the court rested the action upon the breach of the ordinance, and in substance charged them that the fact of so leaving the horses unattended, and of the runaway and injury to plaintiff in consequence, if the jury should so find, established a case against the defendants. The case turns upon the correctness of these instructions.

Highways are dedicated to the use of travellers, and hence it is held to be the law that where horses are unlawfully turned loose or permitted to be at large in a public street by the owner, he is liable for any resulting injury or trespass, without reference to the question of previous knowledge of their vicious disposition or character.

Barnes v. Chapin, 4 Allen, 444; *Goodman v. Gay*, 15 Pa. St. 188, 193. In *Barnes v. Chapin*, the court say, (p. 446): "It has long been regarded as inconsistent with the safety and convenience of travellers to permit horses to go at large on the highway, and such an act is an offence against our statutes." The difference between that case and this is that while the defendants' horses were rightfully on the public street, they were unlawfully left unguarded. The breach of duty arising from the violation of the statute in one case, and the ordinance in the other, is of the same nature, and the consequences the same, as relating to the safety of persons using the streets. Travellers on a highway would have a right to assume that the statutes referred to were made for their protection, and that they were therefore entitled to the benefit thereof in enforcing a claim for damages against persons through whose neglect to observe the requirements of such statutes they have suffered injury. And so it is insisted by the plaintiff in this action that this ordinance is binding as law upon the inhabitants of the city; that it was lawfully made for a similar purpose, and involves like duties and responsibilities, as respects persons within the municipal jurisdiction. This point will be further considered in the course of the opinion.

Wherever a statute creates a duty or an obligation, then, though it has not in express terms given a remedy, the remedy which is by law properly applicable to that obligation follows as an incident. *Addison on Torts*, s. 58; *Parker v. Barnard*, 135 Mass. 116; *Patterson v. Detroit, etc., R. Co.*, 22 N. W. Rep. 260. But whether a liability arising from the breach of a statutory duty accrues for the benefit of an individual specially injured thereby, or whether such liability is exclusively of a public character, must depend upon the nature of the duty enjoined, and the benefits to be derived from its performance. *Taylor v. Lake Shore & M. S. R. Co.*, 45 Mich. 74; *Hayes v. Mich. Central R. Co.*, 111 U. S. 228, 240; *Cooley on Torts*, 658.

To illustrate: *Patterson v. Detroit, etc., R. Co.*, *supra*, was an action for damages by a traveller, against defendants, for obstructing a highway in violation of the provisions of a statute prohibiting railway companies from obstructing a street-crossing longer than five minutes. *Parker v. Barnard* was an action for damages by a person injured through defendant's omission, in disregard of a statute, to protect a hatchway by a railing. *Hayes v. Mich. Central R. Co.* is a case where, as in this case, an action for damages was predicated upon the negligent omission to comply with an ordinance which a city had passed under legislative authority, and which was intended as a protection to persons from injuries. In *Salisbury v. Herchenroder*, 106 Mass. 458, plaintiff recovered damages occasioned by the falling of a sign (in an extraordinary gale) which had been

suspended by defendant over a street, contrary to a city ordinance, and defendant was not otherwise negligent. In *Owings v. Jones*, 9 Md. 108, 117, the defendant was held liable for consequent damages to a party injured through a negligent omission to comply with the provisions of a city ordinance which provided the mode in which vaults in public streets should be protected. In *Devlin v. Gallagher*, 6 Daly, (N. Y.), 494, a failure to comply with the provisions of an ordinance requiring certain precautions in blasting, was held *prima facie* evidence of negligence, sufficient to support an action by one injured through such default. In *Baltimore City Ry. Co. v. McDonnell*, 43 Md. 534, under a city ordinance limiting the speed of cars to six miles an hour, the defendant was held liable if the jury believed from the evidence that the accident would have been avoided if the cars had not been moving at a greater speed. *Johnson v. St. Paul & Duluth R. Co.*, 31 Minn. 283; *Correll v. B. C. R. & M. R. R. Co.*, 38 Iowa, 120; *Siemers v. Eisen*, 54 Cal. 418.

The city ordinance under consideration was undoubtedly intended for the benefit of persons travelling on the streets, and all such persons while so travelling would have the right to expect the ordinance to be observed and to govern themselves accordingly. *Wright v. Malden & M. R. Co.*, 4 Allen, 283; *Lane v. Atlantic Works*, 111 Mass. 136.

On the other hand, where the duties enjoined are due to the municipality or to the public at large, and not as composed of individuals, a different rule is intended to apply. This is well illustrated by the cases of *Kirby v. Boylston Market Assn.*,¹ 14 Gray, 249, and *Flynn v. Canton Co.*, 40 Md. 312, 323, in which it was held that the owners of land abutting on streets were liable to the city alone for the breach of ordinances requiring such owners to keep sidewalks clear of snow and ice, and in good repair, and that they were not liable in damages to persons injured by their neglect to perform the duties enjoined by such ordinances. This proceeds upon the ground that it is the sole duty of the city to keep the streets in good repair, and clear of snow and ice. The work done, and fines or taxes collected, in such cases, to the extent thereof, are to be considered as so far in aid of the city in the discharge of its duty. See, also, *Taylor v. Lake Shore & M. S. R. Co.*, *supra*; *Heeney v. Sprague*, 11 R. I. 456. And so, also, generally of ordinances or statutes relating specially to duties due strictly to the corporation or state.

The analogy between statutes and the ordinances of cities is, of course, not to be extended beyond the proper limits of municipal jurisdiction. But in matters properly of local cognizance it is necessary and eminently proper that such powers should be committed to the municipality, to be exercised through ordinances which

¹ *Ante*, p. 13.

shall be subordinate to and consistent with the general laws, or in proper cases be authorized to take their place. *Cooley*, Const. Lim. *199. An ordinance which a municipal corporation is authorized to make, is as binding on all persons within the corporate limits as any statute or other laws of the commonwealth, and all persons interested are bound to take notice of their existence. *Heland v. City of Lowell*, 3 Allen, 407; *Vandine's Case*, 6 Pick. 187; *Gilmore v. Holt*, 4 Pick. 257; *Johnson v. Simonton*, 43 Cal. 242, 249.

As respects the ordinance in question, it was, as we have seen, authorized by the charter, was within the proper sphere of municipal legislation, and not inconsistent with or in contravention of general laws, and, though local in its application, it was obligatory upon persons within the limits of the city; and there is no reason why it should not be held to impose a legal duty, such that a civil action for damages might be maintained for a breach thereof, as in the case of like statutory duties. *Hayes v. Mich. Central R. Co.* supra; *Mason v. City of Shawneetown*, 77 Ill. 533; *Flynn v. Canton Co.*, 40 Md. 312; *Jackson v. Shawl*, 29 Cal. 267. Some courts, however, deny the application of the rule in case of city ordinances, and insist that it is applicable solely to laws enacted by the legislature. *Heeney v. Sprague*, 11 R. I. 456; *Vandyke v. City of Cincinnati*, 1 Disney (Ohio), 532; *Philadelphia & R. R. Co. v. Ervin*, 89 Pa. St. 71. These were cases arising out of a failure to comply with ordinances similar in character to the one considered in *Flynn v. Canton Co.*, and might have been disposed of on the same ground, and were rightly determined without necessarily involving the question we are considering.

A different view is also suggested in *Chambers v. Ohio Trust Co.*, 1 Disney (Ohio), 327, 336; and in *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488, it was held by a divided court that the result of the decisions in New York is that a breach of a municipal ordinance is evidence of negligence merely, to be considered with other facts in the case. But we do not regard the case of much value as an authority. The rule is to be regarded as a common-law rule, and it would hardly be consistent or reasonable to hold that it might be applicable to an act of the legislature, and inapplicable where the legislature, instead of itself enacting a law, should, in a proper case, expressly authorize a municipal corporation to make the same law for the local jurisdiction. Suppose, for instance, that the legislature had itself expressly enacted the substance of the ordinance in question in the charter, instead of authorizing the city council to enact it: could it be said that in the former case an injured party would be entitled to indemnity, and in the latter not? In this class of cases, therefore, proof of a breach of the ordinance will make a case of negligence; but, of course, the plaintiff must make it appear, as the court properly charged the jury in this case, that the injury com-

plained of resulted from the alleged neglect of the duty thereby imposed; and so defendant may show, as matter of defence, that the accident occurred without his fault, or that the observance of the ordinance was immaterial as respects the plaintiff; as, for instance, in the case of the omission to ring the bell of an engine, of the approach of which the plaintiff otherwise had notice.

Order affirmed.

LAMB v. STONE.

Supreme Court of Massachusetts, October, 1831. 11 Pick. 526.

ACTION on the Case.

The declaration contained five counts. The fifth count alleged, that whereas Thompson, at Oxford, on December 7, 1826, was indebted to the plaintiff in the sum of \$56, and was fraudulently and wrongfully contriving and intending to prevent the plaintiff from recovering the same of Thompson by putting out of his possession the property and estate of which he was possessed, so that the same could not be come at to be attached by due process of law, and avoiding the process of law provided for the collection of debts, by going out of the commonwealth and the reach of said process — of all which the defendant was then and there well knowing — he, the defendant, did, in order to aid and abet Thompson in his wrongful and fraudulent intent, and with the intent to injure and defraud the plaintiff of his demand against Thompson, take into his possession, purchase and receive the property and estate of Thompson, then and there being found, of great value, to wit, \$250, and did fraudulently and with the intent to deprive the plaintiff of the means of recovering his debt of Thompson, aid, abet and assist Thompson to avoid the process of law provided for the collection of debts, by departing out of the commonwealth, which Thompson did, and has ever since remained without the reach and effect of the legal process of the commonwealth, in foreign parts, to wit, in the State of Vermont; whereby the plaintiff was deprived of the means of collecting his debt, as he might and would otherwise have done, and was about to do, by attaching the property or arresting the body of Thompson by due process of law, and has ever since been deprived of his debt and all means of collecting the same or enforcing payment thereof, and has wholly lost the same, and has been otherwise greatly injured by the fraudulent doings of the defendant as aforesaid.

The general issue was pleaded, and upon the trial a general verdict was returned for the plaintiff.

The defendant moved in arrest of judgment, upon the ground that no sufficient cause of action was set forth in the declaration.

MORTON, J. This case comes before us on a motion in arrest of judgment. The verdict of the jury establishes every material allegation in the plaintiff's declaration. And every fact substantially set forth is to be taken to be true. The question for our decision is, whether these facts are sufficient to entitle the plaintiff to judgment. Although the verdict is general, yet in this case, if either count is good, the verdict may be applied to that count and judgment be rendered upon it.

The following are all the material allegations contained in either of the counts — That the plaintiff had a just debt due him from one Thompson — that the latter had property liable to attachment sufficient to pay this debt — that the defendant took a fraudulent conveyance of this property — that Thompson has absconded from the State — that the plaintiff has not been able to arrest him, to attach his property, or otherwise to obtain satisfaction of his debt — and that the acts done by the defendant were done with intent to defraud the plaintiff, by preventing him from securing or getting satisfaction of his debt. Some of these are omitted in several of the counts; but no one contains any other material allegation.

Will these facts support an action?

Before proceeding to the investigation of the main question it may be proper to remark, that the declaration contains no averment that Thompson is insolvent, or that he has not, where he now resides, property liable to be taken, sufficient to satisfy the debt, or that any suit has ever been commenced against him, or any attempt made to arrest his body or attach his property; nor is it alleged, except by implication, that he has not in this State real estate or personal property other than that transferred to the defendant, liable to attachment.

It ought also to be further remarked, that this is not an action of conspiracy or of case in the nature of conspiracy. It is not founded upon any illegal combination or confederacy. The declaration does not set forth any conspiracy to defraud the plaintiff or to evade or defeat any legal process. No such fact can be presumed to exist; and therefore we have no occasion to determine what effect such an averment would have. It will however be perceived, that some of our reasoning would apply to such an action, as well as the one before us.

This is a special action of the case, depending upon the precise facts set forth in the declaration. It is an action of new impression. It is admitted that no precedent can be found for it. This circumstance of itself forms a pretty strong objection. It ought however to have less weight in this than any other form of action. In the diversified transactions of civilized life new combinations of circumstances will sometimes arise, which will require, in the application of well settled principles of law, new forms of declarations.

Among the old and wise axioms of the law none are more sound than those upon which the plaintiff attempts to found this action. In law, for every wrong there is a remedy. 3 Bl. Com. 123; *Ashby v. White*, 1 Salk. 21. Whenever the law creates or recognizes a private right, it also gives a remedy for a violation of it. 1 Chit. Pl. 83; 11 Johns. R. 140. The general principle, that whenever there is fraud or deceit by the one party and injury to the other, or *damnum cum injuria*, there an action will lie, is very often referred to with approbation, and always recognized as good law. *Upton v. Vail*, 6 Johns. R. 182; *Pasley v. Freeman*, 3 T. R. 51; *Eyre v. Dunsford*, 1 East. 329.

But these principles, however sound, must be understood with such qualifications and limitations as other principles of law equally sound necessarily impose upon them. It is very clear that there may be many moral wrongs for which there can be no legal remedy. And there may be legal torts in which the damage to individuals may be very great, and yet so remote, contingent or indefinite, as to furnish no good ground of action. 3 T. R. 63.

Without entering further into the explanation of these principles, their extent, qualifications or limitations, we will proceed to inquire how far they may be relied upon in support of this action. To render them applicable the plaintiff must show that he has sustained damage from the tortious act of the defendant, for which the established forms of law furnish him no remedy. If he may have redress by any of the forms of actions now known and practised, it would be unwise and unsafe to sanction an untried one, the practical operation of which cannot be fully foreseen. The Court will adopt a new remedy to prevent the failure of justice, or to enforce the settled principles of law; but never when justice can be obtained by any of the remedies already known to the law. Com. Dig. Action on the case, B. 8.

The gist of the injury complained of is the fraudulent purchase by the defendant, of the property of the plaintiff's debtor. If the sale was fraudulent, it might be avoided by the creditors, and the property was liable to attachment after as well as before the conveyance. The fraud could be established quite as easily in a suit for the chattels themselves, as in the present case. There is no averment that the defendant had concealed the property, removed it out of the commonwealth, or in any other way so disposed of it that it could not be attached. But even if it were so, and the property could not be come at to be attached specifically, yet it might be attached in the defendant's hands by the trustee process. In this event the defendant would be compellable to disclose all the circumstances attending the transaction, on oath; and if he did not answer truly, would be liable to a special action on the case, by St. 1794, c. 65, s. 9. It would be difficult to show any good reason why the plaintiff might not obtain legal justice in the one or the other of these modes, as easily and

surely as by the present action. *Burlingame v. Bell*, 16 Mass. R. 320; *Devoll v. Brownell*, 5 Pick. 448.

It was said in argument by the plaintiff's counsel, that if he resorted to the trustee process, the defendant would be entitled to any equitable set-off which he might have against his principal; that if he had made advances or paid debts in good faith, he would be allowed to apply them towards satisfaction for the property conveyed to him, and so the plaintiff could not avail himself of the full value of the property. 5 Pick. 32; 6 Pick. 474; 7 Pick. 166.

And why should it not be so? If the defendant paid bona fide the value of the property, the plaintiff is not injured. The owner had good right to sell to whom he pleased, and to prefer any other of his creditors to the plaintiff. If the fraudulent conduct of the defendant has done no injury to the plaintiff, he cannot complain. He cannot have the aid of the law to speculate upon the defendant's fraud. The law will protect him from damage, but will not enable him to derive advantage, from the fraudulent conduct of the defendant.

This action, if sustained, would establish a precedent which would produce in practice great inconvenience and oftentimes do manifest injustice. If the plaintiff may maintain this action against the defendant, so may every creditor of Thompson. The plaintiff had done nothing to give him priority. Shall the fraudulent purchaser be holden to pay all the debts of the fraudulent vendor? Justice does not require this. The conveyance might be fraudulent in law, and yet there might be no moral turpitude in the transaction. The property conveyed might be very small and the debts very large. Shall the value of the property transferred be apportioned among all the creditors? By what rules shall the apportionment be made? Shall the creditor who first sues be entitled to the whole, if his debt be large enough to require the whole for its satisfaction? If one creditor should attach the property specifically, another should summon the fraudulent vendee as trustee of the vendor, and a third should commence an action like this, which would have the preference? Can the same party resort to more than one of these remedies at the same time? And would the judgment in the one be a bar to the other? Many cases might occur, in which it would be extremely difficult to adopt any rule of damages which would do justice to all the parties interested.

But besides these practical inconveniences, which are of themselves insurmountable, there is another objection fatal to the present action. The injury complained of, is too remote, indefinite and contingent. To maintain an action for the deceit or fraud of another, it is indispensable that the plaintiff should show not only that he has sustained damage and that the defendant has committed a tort, but that the damage is the clear and necessary consequence of the tort, and that it can be clearly defined and ascertained. What damage

has the plaintiff sustained by the transfer of his debtor's property? He has lost no lien, for he had none. No attachment has been defeated, for none had been made. He has not lost the custody of his debtor's body, for he had not arrested him. He has not been prevented from attaching the property or arresting the body of his debtor, for he never had procured any writ of attachment against him. He has lost no claim upon or interest in the property, for he never had acquired either. The most that can be said is, that he intended to attach the property and the wrongful act of the defendant has prevented him from executing this intention. Is this an injury for which an action will lie? How can the secret intentions of the party be proved? It may be he would have changed this intention. It may be the debtor would have made a bona fide sale of the property to some other person, or that another creditor would have attached it, or that the debtor would have died insolvent, before the plaintiff would have executed his intention. It is therefore entirely uncertain whether the plaintiff would have secured or obtained payment of his debt, if the defendant never had interfered with the debtor or his property. Besides, his debt remains as valid as it ever was. He may yet obtain satisfaction from property of his debtor, or his debtor may return and pay him. On the whole it does not appear that the tort of the defendant caused any damage to the plaintiff. But even if so, yet it is too remote, indefinite and contingent, to be the ground of an action.

Among the many cases cited by the plaintiff's counsel, those of *Adams et al. v. Paige et al.*, 7 Pick. 542, *Yates v. Joyce*, 11 Johns. R. 136, and *Smith v. Tonstall*, Carthew, 3, bear the greatest resemblance to the case at bar. But an examination of these cases will not only show that there is an obvious and broad distinction between them and the one under consideration, but that the principles adopted in all of them support the ground now taken by the Court.

In *Adams et al. v. Paige et al.*, the plaintiffs had made an attachment of the property of their debtor; the two defendants, one of whom was the debtor, had caused a previous attachment to be made of the same property on a fictitious debt which they had created for the purpose of preventing attachments on bona fide debts. The suit upon which the fraudulent attachment was made was pursued to judgment, the property attached was sold on execution and the proceeds of the sale remained in the hands of the fraudulent judgment debtor. Now by these collusive acts the plaintiffs' attachment was defeated and the price of the property, which but for the fraudulent acts of the defendants would have been applied to the satisfaction of the plaintiffs' execution, was holden by one of the defendants. Here the loss of the debt was the consequence of the loss of the lien, and the loss of the lien was the clear and certain consequence of the fraudulent conduct of the defendants. The injury was direct and

certain, and the damages easily shown and defined. The justice of the plaintiffs' claim was very obvious, and their recovery founded on the soundest principles of law.

Besides, if we were looking for distinctions between *Adams et al. v. Paige et al.* and the case at bar, it would be sufficient to state that the former was an action for a conspiracy between two, to defraud the plaintiffs by means of a fictitious debt and a collusive judgment, in which the unlawful confederacy was the gist of the action.

In *Yates v. Joyce*, the plaintiff, by means of a judgment against his debtor, had, according to the laws of New York, acquired a lien on certain property, which was injured and reduced in value by the tortious acts of the defendant, so as to be insufficient to satisfy the plaintiff's judgment. The plaintiff suffered an injury for which he had no other remedy. The damage was definite and certain, and was the direct and necessary consequence of the defendant's tort. His right to recover was unquestionable.

The old case of *Smith v. Tonstall*, Carth. 3, is very similar and rests upon the same principle. The plaintiff having obtained a judgment against one S., the defendant procured S. to confess a judgment to himself when nothing was due to him. This collusive judgment was satisfied by the sale of goods on which the plaintiff, by his prior judgment, had acquired a lien, thus placing in the defendant's hands the price of goods which were liable for the plaintiff's judgment.

In all these cases the plaintiffs had a clear and valuable interest in or lien on certain property, which was defeated or destroyed by the tortious acts of the defendants. Not so in the case at bar. The plaintiff does not allege that he had any special property or any interest in or claim on any property which was destroyed or injured by any act of the defendant. And we are all of opinion that he has not set forth any such ground of action as can be sustained upon any known principles of law. *Vernon v. Keyes*, 12 East, 632.

Judgment arrested.

VOEGLER *v.* CITY OF NORTH VERNON.

Supreme Court of Indiana, May, 1885. 103 Ind. 314.

ACTION of negligence.

The plaintiff's complaint alleged that through the negligence of the defendant in improving a street her property was damaged by water overflowing thereon. The defendant in its answer alleged first that the improvement of the street was made under an ordinance and plan of the Common Council, duly enacted and adopted; and that the

improvement of the street was, in the judgment of the Common Council, necessary and proper, and that the injuries complained of were the result of the improvement of the street: and secondly, that at a former trial between the same parties for the same cause of action the plaintiff had recovered a judgment for damages and that this judgment was in full force. It appears that the plaintiff demurred to these answers and that the demurrer was sustained in the lower court.

ELLIOTT, J. [After holding that the municipal corporation was liable for negligence in the plan of improvement as well as in the manner of executing the work, the court proceeded:]

There are several paragraphs of the answer pleading a former adjudication, and we perceive no substantial difference between them, but, as we are not aided by a brief from the appellee,¹ and as the third paragraph presents the question in a clearer light than the others, we confine our investigation and decision to that paragraph. The material averments of this paragraph, exhibited in a condensed form, are these: On the 18th day of September, 1879, the appellee filed her complaint in the Jennings Circuit Court against the appellant, and in the action thus begun the appellee recovered judgment for \$80 at the March term, 1880. This judgment remains in full force. The complaint in that action stated as a cause of action the injuries to the same property from the same negligence and unskillful improvement of the same street, as that described and charged in the present action. The appellant has made no other improvement than the one described in the former complaint, and the injuries resulting to appellee's property were such only as were caused by the improvement made prior to the filing of the complaint in the action begun in September, 1879. The concluding averment of the answer is this: "And it is the grading of the same street and the building of the same culverts and the identical grading and building, and the identical negligence and want of care and skill now complained of that were complained of in the former action and not others."

The answer presents a question of great importance and much difficulty. The theory of the appellee, as we infer from the record, is, that the former action embraced only such damages to the real estate as occurred prior to the recovery of the judgment in that action. The theory of the appellant is, that the former action embraced all damages resulting to the appellee's property from the negligent improvement of the street, and that a second action cannot be maintained for the same breach of duty that formed the basis of the first action.

There is a material distinction between damages and injury. Injury is the wrongful act or tort which causes loss or harm to an-

¹ That is, the plaintiff; the parties were reversed in the higher court.

other. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury. The word "injury" denotes the illegal act, the term "damages" means the sum recoverable as amends for the wrong. The words are sometimes used as synonymous terms, but they are, in strictness, words of widely different meaning. There is more than a mere verbal difference in their meaning, for they describe essentially different things. The law has always recognized a difference between the things described, for it is often declared that no action will lie because the act is *damnum absque injuria*. Broom, *Legal Max.* 195; Weeks, *Damnum Absque Injuria*, 7; Broom, *Com.* (4th ed.), 75, 621.

In every valid cause of action two elements must be present — the injury and the damages.¹ The one is the legal wrong which is to be redressed, the other the scale or measure of the recovery. Mayne, *Dam.* 1; 1 Sutherland, *Dam.* 3. As there may be damages without an injury, so there may be an injury without damages. It has many times been said that no action will lie because the injury produced no damages, or, as the law phrase runs, the wrong is *injuria sine damno*.

The distinction between injury and damages is an important one in this instance, and for this reason we have been careful to mark the difference and to enforce our statement by reference to authorities, although the principle involved is a rudimentary one. The distinction is important, for the reason that the law is, that fresh damages, without a fresh injury, will not authorize a second or subsequent action. The rule is thus tersely stated in *Warner v. Bacon*, 8 Gray, 397: "A fresh action cannot be brought unless there be both a new unlawful act and fresh damage." This rule is illustrated by many cases. Mr. Mayne refers to the case of *Howell v. Young*, 5 B. & C. 259, and commenting on it says: "The statute of limitations runs from the act of negligence, not from the time that an injury accrues; such injury is merely consequential damage, not a fresh cause of action; the damages then in the original action must cover all the loss that can ever arise, because no such loss can afterwards be compensated." Mayne, *Dam.* 611. An American author says: "A cause of action and the damages recoverable therefore are an entirety. The party injured must be plaintiff, by the common law, and he must demand all the damages which he has suffered or ever will suffer from the injury, grievance or cause of action, upon which his action is founded. He cannot split a cause of action and bring successive suits for parts, because he may not be able at first to prove all the items of the demand, or because all the damages have not been suffered." 1 Sutherland, *Dam.* 175.

The rule we are discussing applies to cases of personal injuries, for, among the earliest of the reported cases, we find it laid down for

¹ See *Ratcliffe v. Evans*, post. p. 684.

law that in an action for trespass to the person the recovery of damages must be once for all, including past as well as prospective damages. *Fetter v. Beale*, 1 Salk. 11. . . . [The Court quoted from many authorities, including *Secor v. Sturgis*, 16 N. Y. 548, *Adams v. Hastings Co.*, 18 Minn. 260, *Fowle v. N. H. etc. Co.*, 112 Mass. 334, and proceeded:]

There are many cases declaring and enforcing the general rule that the plaintiff may recover in one action all the damages he suffers, whether retrospective or prospective, where the injury which causes the loss or harm is of a permanent character, as a street, a canal or a railroad. All things that proximately contribute to the injury may be taken into consideration in estimating the damages, and if the injury extends so far as to totally destroy the value of the property, then damages equal to the value of the property may be awarded. Mr. Freeman states the rule very strongly. His statement is this: "All the damages which can, by any possibility, result from a single tort, form an indivisible cause of action." He also says: "For damages alone, no action can be permitted. Hence, if a recovery has once been had for the unlawful act, no subsequent suit can be sustained." Freeman, *Judg.*, sec. 241. The cases of *Cadle v. Muscatine Western R. R. Co.*, 44 Iowa, 11, *Finley v. Hershey*, 41 Iowa, 389, *Illinois Central R. R. Co. v. Grabill*, 50 Ill. 241, *Elizabethtown, etc., R. R. Co. v. Combs*, 10 Bush, 382, *Jeffersonville, etc., R. R. Co. v. Esterle*, 13 Bush, 667, illustrate and enforce the principles we are discussing.

In *Fowle v. New Haven etc., Co.*, 112 Mass. 534, S. C. 17 Am. R. 106, language is used which so forcibly applies here that we quote it: "The case at bar," said the court, "is not to be treated strictly in this respect as an action for an abatable nuisance. More accurately it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of reasonable care and skill in its construction. For such an injury the remedy is at common law. And if it results from a cause which is either permanent in its character, or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury."

As probable future damages may be taken into consideration in an action to recover for a loss caused by the negligence of corporate officers in constructing a public work of a permanent character, the plaintiff in such an action can recover all the damages he has sustained, and in such cases no second action can be maintained. To permit a second action to recover damages resulting from the negligent grading of a street, would be to allow successive damages to be awarded where there was no fresh wrong. Great injustice would almost inevitably result from a rule permitting successive actions, for it would be impossible to prevent damages from being twice assessed for the same wrong.

The ultimate conclusions to which these authorities lead are: First. That where there is one cause of action, all the damages must be recovered in one suit, and for fresh damages resulting from the original wrong a second action cannot be maintained. Second. Where the cause of action is the negligence and unskilfulness of the officers of a municipal corporation in the improvement of a street, the injury is complete and permanent, constituting but one cause of action, and in a suit on that cause of action all damages, present and prospective, may be recovered, and for fresh damages resulting from the improvement a second action will not lie.

The complaint of the appellee, as we have seen, is based upon the negligence of the corporate officers in improving a street and the improvement is a permanent one, so that the tort which formed the basis of the action was complete when damages resulted. The answer avers, and the demurrer admits, that there was no new wrong or negligence. As the pleadings stand, there is a single wrong and nothing more. The fresh damages do not, as the pleadings aver, arise from a new or fresh wrong. The case, therefore, is not within the authorities which hold that where there is a new neglect or a fresh wrong, there may be a second action.

The answer avers that the injury complained of is the same as that declared on in the former action. It goes even further, for it affirmatively shows that no improvement has been made, and that no grading has been done since that described in the former complaint. The causes of action are, therefore, the same. Where the answer avers the causes of action to be the same, and the record does not show them to be different, the averment is taken to be true on demurrer. *Cutler v. Cox*, 2 Blackf. 178.

If the causes of action are not the same, that fact must be replied. *James v. State*, 7 Blackf. 325. We have, upon the pleadings, therefore, a case where there are fresh damages, but where there is no fresh cause of action, for the utmost that can be yielded to the appellee is, that the record shows that damages have resulted since the first action, flowing, however, from the original wrong. We need not decide what might be successfully replied; we simply decide the question before us, and our decision is that the answer sufficiently pleads a former adjudication.

We have already placed stress upon the fact that the construction of the highway is permanent, and that the wrong was complete when the street, as a permanent work, was finished and damages resulted. We deem it proper to emphasize this element of the case, for we can readily conceive cases of an essentially different character where a very different rule would apply. We can conceive of cases where a temporary wrong might be done under such circumstances as would make it reasonable to presume that the defendant would right the wrong before a recurrence of harm or loss, and in such cases it might

well be that the plaintiff could bring a second action. We know that there are cases where it is proper to presume that the wrong-doer will not maintain the unlawful thing that caused the harm or loss. Mayne, Dam., 141, section 110. But the case upon which we are pronouncing judgment, and to which we confine our decision, is one where the improvement of the street was a completed and permanent fact, and where the parties must presume that it was permanent in its character, and that it was intended that the thing done should remain unchanged. It cannot be presumed that municipal officers, having built a street or road, intended it to be temporary; a presumption that the wrong was not of a permanent character might, perhaps, obtain where a natural watercourse is temporarily obstructed, or where, in the course of improving a street, water was thrown upon a lot; but it cannot prevail where the improvement of a street is complete and the street permanently constructed.

This is not the case of a nuisance. It is the case of a negligent improvement of a street. The improvement was in itself rightful and legal, but the manner in which the improvement was made was wrongful. The wrong was not in grading the street, but in the manner of doing it. It is not a nuisance for a municipal corporation to grade its streets, but it is an actionable wrong to do it negligently. The wrong in negligently grading the street is the basis of the action, for there are no facts alleged constituting a nuisance. It is not a nuisance to do what the law authorizes, but it may be a tort to do the authorized act in a negligent manner. It is evident, therefore, that the cases which hold that the continuance of a nuisance will supply grounds for successive actions have no influence upon this case.

Judgment reversed.

SPECIFIC TORTS.

PART I.

CULPABLE MIND.

WRONGFUL MEANS: FRAUD.

CHAPTER I.

DECEIT.

PASLEY *v.* FREEMAN.

King's Bench of England, Hilary Term, 1789. 3 T. R. 51.

THIS was an action in the nature of a writ of deceit, to which the defendant pleaded the general issue. And after a verdict for the plaintiffs on the third count, a motion was made for a new trial, and, that being refused, another in arrest of judgment.

The third count alleged in substance that the defendant, intending to deceive and defraud the plaintiffs, and knowing the contrary to be true, falsely and fraudulently represented to the plaintiffs that one J. C. Falch was a person safely to be trusted in the purchase on credit of sixteen bags of cochineal; that the plaintiffs, not knowing that the representation was false, but believing it to be true, were induced to sell to said J. C. F. sixteen bags of cochineal on credit; and that neither said J. C. F. nor any one else has ever paid for the same; to the damage of the plaintiffs, &c.

GROSE, J.¹ Upon the face of this count in the declaration, no privity of contract is stated between the parties. No consideration arises to the defendant; and he is in no situation in which the law considers him in any trust, or in which it demands from him any account of the credit of Falch. He appears not to be interested in any transaction between the plaintiffs and Falch, nor to have colluded with them; but he knowingly asserted a falsehood, by saying that Falch might be safely intrusted with the goods, and given credit to, for the purpose of inducing the plaintiffs to trust him with them, by which the plaintiffs lost the value of the goods. Then this is an action against the defendant for making a false affirmation, or telling

¹ Dissenting.

a lie, respecting the credit of a third person, with intent to deceive, by which the third person was¹ damnified; and for the damages suffered, the plaintiffs contend that the defendant is answerable in an action upon the case. It is admitted that the action is new in point of precedent; but it is insisted that the law recognizes principles on which it may be supported. The principle upon which it is contended to lie is that, wherever deceit or falsehood is practised to the detriment of another, the law will give redress. This proposition I controvert, and shall endeavor to show that, in every case where deceit or falsehood is practised to the detriment of another, the law will not give redress; and I say that by the law, as it now stands, no action lies against any person standing in the predicament of this defendant for the false affirmation stated in the declaration. If the action can be supported, it must be upon the ground that there exists in this case what the law deems *damnum cum injuria*. If it does, I admit that the action lies; and I admit that upon the verdict found the plaintiffs appear to have been damnified. But whether there has been *injuria*, a wrong, a tort, for which an action lies, is a matter of law. The tort complained of is the false affirmation made with intent to deceive; and it is said to be an action upon the case analogous to the old writ of deceit. When this was first argued at the bar, on the motion for a new trial, I confess I thought it reasonable that the action should lie; but, on looking into the old books for cases in which the old action of deceit has been maintained upon the false affirmation of the defendant, I have changed my opinion. The cases on this head are brought together in Bro. tit. Deceit, pl. 29, and in Fitz. Abr. I have likewise looked into Danvers, Kitchins, and Comyns, and I have not met with any case of an action upon a false affirmation, except against a party to a contract, and where there is a promise, either express or implied, that the fact is true, which is misrepresented; and no other case has been cited at the bar. Then if no such case has ever existed, it furnishes a strong objection against the action, which is brought for the first time for a supposed injury, which has been daily committed for centuries past. For I believe there has been no time when men have not been constantly damnified by the fraudulent misrepresentations of others; and if such an action would have lain, there certainly has been, and will be, a plentiful source of litigation, of which the public are not hitherto aware. A variety of cases may be put. Suppose a man recommends an estate to another, as knowing it to be of greater value than it is; when the purchaser has bought it, he discovers the defect, and sells the estate for less than he gave: why may not an action be brought for the loss upon any principle that will support this action? And yet such an action has never been attempted. Or suppose a person present at the sale of a horse asserts that he was his horse, and that he knows him

¹ Sic for plaintiffs were.

to be sound and sure-footed, when, in fact, the horse is neither the one nor the other; according to the principle contended for by the plaintiffs, an action lies against the person present as well as the seller, and the purchaser has two securities. And even in this very case, if the action lies, the plaintiffs will stand in a peculiarly fortunate predicament, for they will then have the responsibility both of Falch and the defendant. And they will be in a better situation than they would have been if, in the conversation that passed between them and the defendant, instead of asserting that Falch might safely be trusted, the defendant had said, "If he do not pay for the goods, I will;" for then, undoubtedly, an action would not have lain against the defendant. Other and stronger cases may be put of actions that must necessarily spring out of any principle, upon which this can be supported, and yet which were never thought of till the present action was brought. Upon what principle is this act said to be an injury? The plaintiffs say, on the ground that, when the question was asked, the defendant was bound to tell the truth. There are cases, I admit, where a man is bound not to misrepresent, but to tell the truth; but no such case has been cited, except in the case of contracts; and all the cases of deceit for misinformation may, it seems to me, be turned into actions of assumpsit. And so far from a person being bound in a case like the present to tell the truth, the books supply me with a variety of cases, in which even the contracting party is not liable for a misrepresentation. There are cases of two sorts in which, though a man is deceived, he can maintain no action. The first class of cases (though not analogous to the present) is where the affirmation is that the thing sold has not a defect which is a visible one; there the imposition, the fraudulent intent, is admitted, but it is no tort. The second head of cases is where the affirmation is (what is called in some of the books) a nude assertion, such as the party deceived may exercise his own judgment upon; as where it is matter of opinion, where he may make inquiries into the truth of the assertion, and it becomes his own fault from laches that he is deceived. 1 Roll. Abr. 101; Yelv. 20; 1 Sid. 146; Cro. Jac. 386; Bayly v. Merrel. In *Harvey v. Young*, Yelv. 20, G. S., who had a term for years, affirmed to F. D. that the term was worth £150 to be sold, upon which F. D. gave £150, and afterwards could not get more than £100 for it, and then brought his action; and it was alleged that this matter did not prove any fraud, for it was only a naked assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. But if the defendant had warranted the term to be of such a value to be sold, and upon that the plaintiff had bought it, it would have been otherwise: for the warranty given by the defendant is a matter to induce confidence and trust in the plaintiff. This case, and the passage in 1 Roll. Abr. 101, are recognized in 1 Sid. 146. How, then, are the cases? None exist in which such an action as the

present has been brought; none, in which any principle applicable to the present case has been laid down to prove that it will lie; not even a dictum. But from the cases cited some principles may be extracted to show that it cannot be sustained: 1st. That what is fraud, which will support an action, is matter of law. 2d. That in every case of fraudulent misrepresentation, attended with damage, an action will not lie even between contracting parties. 3d. That if the assertion be a nude assertion, it is that sort of misrepresentation the truth of which does not lie merely in the knowledge of the defendant, but may be inquired into, and the plaintiff is bound so to do; and he cannot recover a damage which he has suffered by his laches. Then let us consider how far the facts of the case come within the last of these principles. The misrepresentation stated in the declaration is respecting the credit of Falch; the defendant asserted that the plaintiffs might safely give him credit; but credit to which a man is entitled is matter of judgment and opinion, on which different men might form different opinions, and upon which the plaintiffs might form their own, to mislead which no fact to prove the good credit of Falch is falsely asserted. It seems to me, therefore, that any assertion relative to credit, especially where the party making it has no interest, nor is in any collusion with the person respecting whose credit the assertion is made, is like the case in *Yelverton* respecting the value of the term. But at any rate, it is not an assertion of a fact peculiarly in the knowledge of the defendant. Whether Falch deserved credit depended on the opinion of many; for credit exists on the good opinion of many. Respecting this the plaintiffs might have inquired of others, who knew as much as the defendant; it was their fault that they did not, and they have suffered damage by their own laches. It was owing to their own gross negligence that they gave credence to the assertion of the defendant, without taking pains to satisfy themselves that that assertion was founded in fact, as in the case of *Bayly v. Merrel*. I am, therefore, of opinion that this action is as novel in principle as it is in precedent, that it is against the principles to be collected from analogous cases, and consequently that it cannot be maintained.

BULLER, J. The foundation of this action is fraud and deceit in the defendant, and damage to the plaintiffs. And the question is, whether an action thus founded can be sustained in a court of law. Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies. Per Croke, J., 3 Bulst. 95. But it is contended that this was a bare, naked lie; that, as no collusion with Falch is charged, it does not amount to a fraud; and, if there were any fraud, the nature of it is not stated. And it was supposed by the counsel, who originally made the motion, that no action could be maintained unless the defendant, who made this false assertion, had an interest in so doing. I agree that an action cannot

be supported for telling a bare, naked lie; but that I define to be, saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat, or deceive another person. Every deceit comprehends a lie; but a deceit is more than a lie, on account of the view with which it is practised, its being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion, to another person. Deceit is a very extensive head in the law; and it will be proper to take a short view of some of the cases which have existed on the subject, to see how far the courts have gone, and what are the principles upon which they have decided. I lay out of the question the case in 2 Cro. 196, and all other cases which relate to freehold interests in lands; for they go on the special reason that the seller cannot have them without title, and the buyer is at his peril to see it. But the cases cited on the part of the defendant deserving notice are Yelv. 20, Carth. 90, Salk. 210. The first of these has been fully stated by my brother Grose; but it is to be observed that the book does not affect to give the reasons on which the court delivered their judgment; but it is a case quoted by counsel at the bar, who mentions what was alleged by counsel in the other case. If the court went on a distinction between the words "warranty" and "affirmation," the case is not law; for it was rightly held by Holt, C. J., in the subsequent cases, and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear on evidence to have been so intended. But the true ground of that determination was that the assertion was of mere matter of judgment and opinion; of a matter of which the defendant had no particular knowledge, but of which many men will be of many minds, and which is often governed by whim and caprice. Judgment, or opinion, in such cases, implies no knowledge. And here this case differs materially from that in Yelverton: my brother Grose considers this assertion as mere matter of opinion only, but I differ from him in that respect. For it is stated on this record that the defendant knew that the fact was false. The case in Yelverton admits that, if there had been fraud, it would have been otherwise. The case of *Crosse v. Gardner*, Carth. 90, was upon an affirmation that oxen which the defendant had in his possession, and sold to the plaintiff, were his, when in truth they belonged to another person. The objection against the action was that the declaration neither stated that the defendant deceitfully sold them, or that he knew them to be the property of another person; and a man may be mistaken in his property and right to a thing without any fraud or ill intent. *Ex concessis* therefore if there were fraud or deceit, the action would lie; and knowledge of the falsehood of the thing asserted is fraud and deceit. But, notwithstanding these objections, the court held that the action lay, because the plaintiff had no means of knowing to whom the property belonged but only by the possession. And in Cro.

Jac. 474, it was held that affirming them to be his, knowing them to be a stranger's, is the offence and cause of action. The case of *Medina v. Stoughton*, Salk. 210, in the point of decision, is the same as *Crosse v. Gardner*; but there is an obiter dictum of Holt, C. J., that where the seller of a personal thing is out of possession, it is otherwise; for there may be room to question the seller's title, and caveat emptor in such case to have an express warranty or a good title. This distinction by Holt is not mentioned by Lord Raym. 593, who reports the same case; and if an affirmation at the time of sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion; and, if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on. These cases, then, are so far from being authorities against the present action, that they show that, if there be fraud or deceit, the action will lie; and that knowledge of the falsehood of the thing asserted is fraud and deceit. Collusion, then, is not necessary to constitute fraud. In the case of a conspiracy, there must be a collusion between two or more to support an indictment; but if one man alone be guilty of an offence which, if practised by two, would be the subject of an indictment for a conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured. That knowledge of the falsehood of the thing asserted constitutes fraud, though there be no collusion, is further proved by the case of *Risney v. Selby*, Salk. 211, where, upon a treaty for the purchase of a house, the defendant fraudulently affirmed that the rent was £30 per annum, when it was only £20 per annum, and the plaintiff had his judgment; for the value of the rent is a matter which lies in the private knowledge of the landlord and tenant; and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it. No collusion was there stated; nor does it appear that the tenant was ever asked a question about the rent, and yet the purchaser might have applied to him for information; but the judgment proceeded wholly upon the ground that the defendant knew that what he asserted was false. And, by the words of the book, it seems that, if the tenant had said the same thing, he also would have been liable to an action. If so, that would be an answer to the objection that the defendant in this case had no interest in the assertion which he made. But I shall not leave this point on the dictum or inference which may be collected from that case. If A, by fraud and deceit, cheat B out of £1000, it makes no difference to B whether A or any other person pockets that £1000. He has lost his money; and, if he can fix fraud upon A, reason seems to say that he has a right to seek satisfaction against him. Authorities are not wanting on this point. 1 Roll. Abr. 91, pl. 7. If the vendor affirm that the goods are the

goods of a stranger, his friend, and that he had authority from him to sell them, and, upon that, B buys them, when in truth they are the goods of another, yet, if he sell them, fraudulently and falsely, on this pretence of authority, though he do not warrant them, and though it be not averred that he sold them, knowing them to be the goods of the stranger, yet B shall have an action for this deceit. It is not clear from this case whether the fraud consisted in having no authority from his friend, or in knowing that the goods belonged to another person: what is said at the end of the case only proves that "falsely" and "fraudulently" are equivalent to "knowingly." If the first were the fact in the case, namely, that he had no authority, the case does not apply to this point; but if he had an authority from his friend, whatever the goods were sold for, his friend was entitled to, and he had no interest in them. But, however that might be, the next case admits of no doubt. For, in 1 Roll. Abr. 100, pl. 1, it was held, that if a man acknowledge a fine in my name, or acknowledge a judgment in an action in my name of my land, this shall bind me forever; and, therefore, I may have a writ of deceit against him who acknowledged it. So if a man acknowledge a recognizance, statute-merchant or staple, there is no foundation for supposing that in that case the person acknowledging the fine or judgment was the same person to whom it was so acknowledged. If that had been necessary, it would have been so stated; but if it were not so, he who acknowledged the fine had no interest in it. Again, in 1 Roll. Abr. 95, pl. 25, it is said, "If my servant lease my land to another for years, reserving a rent for me, and, to persuade the lessee to accept it, he promise that he shall enjoy the land without incumbrances, if the land be incumbered, &c., the lessee may have an action on the case against my servant, because he made an express warranty." Here, then, is a case in which the party had no interest whatever. The same case is reported in Cro. Jac. 425; but no notice is taken of this point, probably because the reporter thought it immaterial whether the warranty be by the master or servant. And if the warranty be made at the time of the sale, or before the sale, and the sale is upon the faith of the warranty, I can see no distinction between the cases. The gist of the action is fraud and deceit; and if that fraud and deceit can be fixed by evidence on one who had no interest in his iniquity, it proves his malice to be the greater. But it was objected to this declaration that, if there were any fraud, the nature of it is not stated. To this the declaration itself is so direct an answer, that the case admits of no other. The fraud is that the defendant procured the plaintiffs to sell goods on credit to one whom they would not otherwise have trusted, by asserting that which he knew to be false. Here, then, is the fraud and the means by which it was committed; and it was done with a view to enrich Falch by impoverishing the plaintiffs, or, in other words, by cheating the plaintiffs out of their goods. The cases which

I have stated, and Sid. 146, and 1 Keb. 522, prove that the declaration states more than is necessary; for "fraudulenter" without "sciens," or "sciens" without "fraudulenter," would be sufficient to support the action. But, as Mr. J. Twisden said in that case, the fraud must be proved. The assertion alone will not maintain the action; but the plaintiff must go on to prove that it was false, and that the defendant knew it to be so: by what means that proof is to be made out in evidence need not be stated in the declaration. Some general arguments were urged at the bar to show that mischiefs and inconveniences would arise if this action were sustained; for if a man who is asked a question respecting another's responsibility hesitate or is silent, he blasts the character of the tradesman; and if he say that he is insolvent, he may not be able to prove it. But let us see what is contended for: it is nothing less than that a man may assert that which he knows to be false, and thereby do an everlasting injury to his neighbor, and yet not be answerable for it. This is as repugnant to law as it is to morality. Then it is said that the plaintiffs had no right to ask the question of the defendant. But I do not agree in that; for the plaintiffs had an interest in knowing what the credit of Falch was. It was not the inquiry of idle curiosity, but it was to govern a very extensive concern. The defendant undoubtedly had his option to give an answer to the question or not; but if he gave none, or said he did not know, it is impossible for any court of justice to adopt the possible inferences of a suspicious mind as a ground for grave judgment. All that is required of a person in the defendant's situation is that he shall give no answer, or that, if he do, he shall answer according to the truth as far as he knows. The reasoning in the case of *Coggs v. Barnard*, which was cited by the plaintiff's counsel, is, I think, very applicable to this part of the case. If the answer import insolvency, it is not necessary that the defendant should be able to prove that insolvency to a jury; for the law protects a man in giving that answer, if he does it in confidence and without malice. No action can be maintained against him for giving such an answer, unless express malice can be proved. From the circumstance of the law giving that protection, it seems to follow as a necessary consequence, that the law not only gives sanction to the question, but requires that, if it be answered at all, it shall be answered honestly. There is a case in the books which, though not much to be relied on, yet serves to show that this kind of conduct has never been thought innocent in Westminster Hall. In *Rex v. Gunston*, 1 Str. 589, the defendant was indicted for pretending that a person of no reputation was Sir J. Thornycraft, whereby the prosecutor was induced to trust him; and the court refused to grant a certiorari, unless a special ground were laid for it. If the assertion in that case had been wholly innocent, the court would not have hesitated a moment. How, indeed, an indictment could be maintained for that I

do not well understand; nor have I learnt what became of it. The objection to the indictment is that it was merely a private injury; but that is no answer to an action. And if a man will wickedly assert that which he knows to be false, and thereby draws his neighbor into a heavy loss, even though it be under the specious pretence of serving his friend, I say “*ausis talibus istis non jura subserviunt.*”

ASHHURST, J., and LORD KENYON, C. J., delivered opinions concurring with BULLER, J.

*Rules for arresting the judgment discharged.*¹

MAHURIN v. HARDING.

Supreme Court of New Hampshire, December, 1853. 28 N. H. 128.

TRESPASS on the Case. The declaration was as follows:

In a plea of trespass on the case, for that the said J. & J. (defendants) on &c., at &c., being possessed of one mare, of a dark brown color, which mare was unsound and infected with a bad and inveterate disease, commonly called glanders, which rendered the said mare good for nothing; and the plaintiff being then and there also possessed of another mare, of a bay color, of his own proper mare, of the value of \$100; the defendants, to induce the plaintiff to exchange with them, did then and there falsely and fraudulently affirm to the plaintiff that their, the said defendants', mare was then well, good and sound, with the exception of “a slight touch of the heaves;” whereupon the plaintiff, giving full credit to said defendants' said affirmation, was instantly induced to and did then and there deliver his said bay mare to the defendants in exchange for said defendants' brown mare as aforesaid; and the defendants did then and there deliver their said brown mare to the plaintiff in exchange for the plaintiff's said bay mare, and also did then and there give to the plaintiff one sucking colt, of the value of twenty dollars, and also gave to the plaintiff one joint and several note for thirty dollars, and one other joint and several note for five dollars, as boot between said mares. Now the plaintiff in fact says, that the defendants' mare aforesaid was not at the time of the delivery, exchange and affirmation aforesaid, well, sound or good; but that said mare was then and there infected with and labored under a bad and inveterate disease, called glanders, as aforesaid, which made said mare utterly unfit for any service and good for nothing, and soon after died of the said glanders, as afore-

¹ See *Savage v. Jackson*, 19 Ga. 305, criticizing *Pasley v. Freeman*; and see *Mass. Rev. Laws*, ch. 74, § 4, requiring that representations of credit must be in writing to be actionable.

said; of all which the said defendants were then and there well knowing. And so the said defendants, by means of their said false affirmation, have greatly injured and defrauded the plaintiff, to his damage, &c.

Upon the trial on the general issue, the court instructed the jury that the plaintiff must prove that the affirmation was both false and fraudulent, that in this State the defendant is liable to arrest for a fraudulent affirmation, by which the plaintiff has suffered damage, but not for a mere breach of contract, and that in other respects the distinction between tort and contract is material and should be regarded, and therefore if they found that the defendants stated as a fact for the plaintiff to rely upon, that the mare was sound (with the exception named in the writ), and found that she was not sound; yet if the defendants made this statement in entire good faith, fully believing it to be true, they are not liable in this form of action; but if the affirmation was known, or believed or suspected by them to be false, and the event proved that it was so, it should be deemed fraudulent.

The jury found a verdict for the defendants, which the plaintiff moved to set aside because of said instructions.

BELL, J. The declaration in this case is in trespass on the case for deceit in a sale.

It is said in some of the books that *assumpsit* and case for deceit are in certain cases concurrent remedies for the same injuries in the sale of horses; and to some extent this is true.

Where a seller is chargeable upon an implied warranty of title, or where he makes an express warranty, or makes such statements as to the quality of the article he sells as he intends the purchaser shall rely upon, and which in law constitute a warranty; *Morrill v. Wallace*, 9 N. H. Rep. 111; *Whitney v. Sutton*, 10 Wend. 413; *Cook v. Mosely*, 13 Wend. 277; while at the same time he knows them to be false, and intends by them to deceive and impose upon the purchaser, the buyer may seek his redress either by action of *assumpsit* upon his warranty, or by action of deceit for the fraud. *Stuart v. Wilkins*, Doug. 21; *Williamson v. Allison*, 2 East, 446; *Wallace v. Jarman*, 2 Stark. 162; *Wardell v. Davis*, 13 Johns. 325; *Cravens v. Grant*, 4 Mon. 126; 2 Stephen's N. P. 1285.

The warranty is none the less a contract because it is the means by which a fraud is accomplished, and the fraud is in no way diminished, because the seller has at the same time bound himself by a warranty.

But these remedies, though concurrent, and though they entitle the sufferer to the same measure of redress in damages, are by no means identical. The distinction between the two classes of actions, as being founded respectively on tort and on contract, is nowhere neglected or disregarded. There are substantial differences at common law, and, as remarked by the learned judge who tried this case, in his charge to

the jury, the distinction is not merely formal, but in the present state of our law there is a substantial difference, which must not be overlooked. In tort, here, there is a remedy against the person, which ordinarily does not exist in actions on contracts.

The forms of declaring in these cases are substantially different. The declaration in *assumpsit* always states a consideration and a promise or warranty, and complains of a breach of the warranty. 1 Ch. Pl. 99; Saund. Pl. and Ev. 111; *Carley v. Wilkins*, 6 Barb. S. C. 557; *Edick v. Crim*, 10 Barb. S. C. 445. The contract to warrant, of the breach of which the plaintiff complains, and the entire consideration for it, is indispensable to be stated. *Miles v. Sheward*, 8 East, 7; *Webster v. Hodgkins*, 5 Foster's Rep. 128.

In this action the allegations very often introduced, that the defendant intended to defraud, that he knew his warranty to be false, and that he thereby deceived and defrauded the plaintiff, are immaterial, and need not be proved. The defendant is bound to answer for his false warranty, whether he knew it to be false or not; whether he intended a fraud, or acted with entire good faith, and fully believed it to be true. *Denison v. Ralphson*, 1 Vent. Rep. 366; *Northcote v. Maynard*, 3 Keb. 807; *Anon. Lofft*, 146; *Gresham v. Postan*, 2 C. & P. 540; *Bayard v. Malcom*, 1 Johns. 453; 2 Johns. 550; *Case v. Boughton*, 11 Wend. 107; *Carly v. Wilkins*, 6 Barb. S. C. 557.

The declaration for deceit alleges that the defendant induced the plaintiff to purchase an article by a warranty or by statements which he knew to be false, and thereby deceived and defrauded him. *Evertson v. Miles*, 6 Johns. 138; *Case v. Boughton*, 11 Wend. 107; *Carley v. Wilkins*, 6 Barb. S. C. 557; *Edick v. Crim*, 10 Barb. S. C. 445. And this is all that is essential to be alleged. *Barney v. Dewey*, 13 Johns. 224; *Weeks v. Burton*, 7 Vt. Rep. 67. It is not necessary to make any allegation in relation to the consideration or the terms of the contract of sale, unless they happen to be connected with the fraud alleged, in that case, though if a party incautiously recites the particulars of such a contract, he may be compelled to prove them as he states them, and may fail if any material variance occurs in his proof. *Weall v. King*, 12 East, 452; *Jones v. Cowley*, 4 B. & C. 446; *Hands v. Burton*, 9 East, 349; *Morris v. Littlegoe*, 2 Smith, 394; *Blyth v. Bampton*, 3 Bing. 472; *Webster v. Hodgkins*, ub. sup.; *Hart v. Dixon*, 1 Sel. N. P. 104; 2 N. H. Rep. 291; *Barney v. Dewey*, 13 Johns. 224; *Corwin v. Davidson*, 9 Cow. 22; *Porter v. Talcott*, 1 Cow. 359.

But the intention to defraud, the knowledge that his warranty or his statements were false, and the fact that the plaintiff was thereby defrauded, constitute, in cases of this kind, the very gist and foundation of the action for deceit and they must be proved, or the action must fail. *Springwell v. Allen*, Aleyn, 91; *Parkinson v. Lee*, 2 East, 313; *Dowling v. Mortimer*, 2 East, 449 n.; 2 Stark. Ev. 266; 2 St.

N. P. 1286; Dale's case, Cro. El. 44; *Turner v. Brent*, 12 Mod. 245; 1 Com. Dig. Action for Deceit, A. 8, A. 11, E. 4; *Evertsen v. Miller*, 6 Johns. 138; *Young v. Covell*, 8 Johns. 23; *Addington v. Allen*, 11 Wend. 375.

A seller may in good faith make statements as to the qualities of the articles he sells, believing them to be true, and intending that the purchaser should rely upon them, either in the form of explicit warranties, or of such representations as in law constitute warranties, and the purchase may be made in reliance upon their truth; but the seller is guilty of no fraud or deceit, for bad faith and a design to deceive are essential elements of every fraud, or deception;¹ and though he may be liable upon his warranty, yet no action, founded on fraud or deceit, will lie in such case. *Stone v. Denny*, 4 Met. 151; *Rubber Co. v. Adams*, 23 Pick. 256; *Emerson v. Brigham*, 10 Mass. Rep. 197; *Kingsbury v. Taylor*, 29 Maine Rep. 508; *Hazard v. Irwin*, 18 Pick. 95; *Shrewsbury v. Blunt*, 2 M. & G. 475; *Freeman v. Baker*, 5 B. & Ad. 797; *Page v. Bent*, 2 Met. 371.

It is on this principle that it has in many cases been made a serious question, what form of allegation was sufficient distinctly to express this charge. *Chandler v. Lopus*, Cro. Jac. 4; *Medina v. Stoughton*, 1 Salk. 210; s. c. 1 Ld. Ray. 593; *Leakins v. Chissell*, Sid. 146; *Northcote v. Maynard*, 3 Keb. 807; *Cross v. Garnett*, 3 Mod. 261; *Warner v. Tallard*, Rolle's Ab. 91; *Elkins v. Tresham*, 1 Lev. 102; 1 Bac. Ab. 80; *Bayard v. Malcom*, 1 Johns. 453; 2 Johns. 550; *Lysney v. Selby*, 2 Ld. Ray. 1118; *Harding v. Freeman*, Sty. 310; s. c. 1 Rolle's Ab. 91; 1 Com. Dig. Action for Deceit, F. 3, E. 4.

If by the exercise of some ingenuity a declaration could be drawn in such a form that it may seem doubtful whether it is designed to be founded on tort or on contract, and not entirely defective if regarded as either the one or the other, yet it must be held to be founded either in tort or on contract. It cannot be considered as having a double aspect or character, or being either the one or the other, as the exigencies of the case may from time to time happen to require. To allow it such a double character would be contrary to the whole theory of the common law, and would make it a perfect anomaly in legal proceedings.

In former times, the more usual form of declaring in actions upon a false warranty, was in case for deceit, in which it was more commonly alleged that the defendant warrantizando vendidit an article as sound, well knowing that it was not so, though declarations in assumpsit were not uncommon. 2 Inst. Cler. 227; *Butterfield v. Burroughs*, 1 Salk. 211; nor declarations in case without warrantizando vendidit. *Furnis v. Leicester*, Cro. Jac. 474; *Roswell v. Vaughan*, Cro. Jac. 196; *Cross v. Garnett*, 3 Mod. 261; *Kendrick v. Burgess*, Mo. 126.

¹ See post, pp. 72-80.

In *Williamson v. Allison*, 2 East, 445, in 1802, in a declaration upon a warrantizando vendidit, it was expressly held, that the declaration was in case for deceit, but that by striking out the averment of the scienter, the action might still be maintained in tort, and therefore the scienter was not necessary to be proved. It seems to have been decided upon the authority of a nisi prius ruling in a case, where it did not appear whether the action was on contract (where the ruling would have been right, but no authority for the case in hand), or in tort; and it was conjectured it must have been in tort, because such was then the more common form of declaring.

This decision seems to have been since followed in some cases in England. *Gresham v. Postan*, 2 C. & P. 540; and is cited in most of the elementary English books on the subject.

It has been followed in Vermont and some of the other States, and has been made the basis of a theory that in actions for deceit in the sale of personal property, if an express warranty is proved, it is not necessary to prove the scienter, or any allegation that the false warranty or affirmation was made with any design to deceive.¹ But this idea is not supported by the decision in *Williamson v. Allison*, which is expressly limited to a declaration upon a warrantizando vendidit.

See 3 Vt. Rep. 53; 10 Vt. Rep. 457; 17 Vt. Rep. 583.

The English case is without authority here, and seems to us entirely unsupported by any authority at common law. And it seems to us entirely inconsistent with the doctrines of the common law to hold that an action for deceit can be sustained without evidence of the intention to deceive. It would be unjustifiable to hold that a man may be imprisoned on execution in an action for a tort, where a court should hold no proof need be produced but of an express contract. In the case of *Crooker v. Willard* (Sullivan, July Term, 1851),² it was held that a count alleging a deceit in a sale in the same form as in *Williamson v. Allison*, could not be joined with one on contract, so far, agreeing with that case. But that decision is entirely irreconcilable with the case of *Vail v. Strong*, 10 Vt. Rep. 457, that such a declaration has a double aspect, which makes it join well with assumpsit or trover. And the same view of such a declaration was taken in *Webster v. Hodgkins*, supra. With those decisions we remain entirely satisfied.

The present case has a declaration framed upon a different principle. It could not be supported as a declaration on a warranty, on any idea of rejecting the allegations importing a charge of fraud, if the cases referred to were not questioned.

It sets forth, that the defendants being possessed of a horse, which was unsound, and the plaintiff of another, of value, the defendants, to induce the plaintiff to exchange with them, did falsely and fraudu-

¹ Cf. *Litchfield v. Hutchinson*, post, p. 67.

² *Crooker v. Willard* is reported in a foot-note, 28 N. H. 134.

lently affirm to him, that their horse was sound, and the plaintiff giving credit to their affirmation was induced to exchange, and did so, whereas the defendants' horse was not sound, &c., which they well knew, and so the defendants, by their false affirmation, have greatly injured and defrauded the plaintiff.

This is a common form of declaring in case for deceit. It has no feature of a declaration in *assumpsit*. It contains no promise, nor undertaking, nor consideration for any. It complains of no breach of any contract, or warranty. It does not even speak of any warranty. Its gist and substance is that the defendants, by their false and fraudulent affirmation, have defrauded the plaintiff, and not by any breach of contract. Assuredly no court could hold that such a declaration was proved by any evidence which did not establish the fact of fraud, of an intention to deceive, carried into effect by statements known to be false.

As, then, the allegation that the defendants well knew their horse to be unsound, was essential to be inserted in the declaration, either in direct terms, or in expressions of equivalent import, and necessary to be proved, the charge of the court below was entirely correct, and there must be

Judgment on the verdict.

KAIN v. OLD, ET ALS., EXECUTORS OF DODDS.

King's Bench of England, Hilary Term, 1824. 2 B. & C. 274 (*627).

ACTION of *assumpsit*.

There was a verdict for the plaintiff subject to the opinion of the Court upon the following case. In October, 1816, the testator, Dodds, being sole owner of a ship called the *Fortitude*, sold her to the plaintiff for £1650, and signed and delivered to the plaintiff, Kain, an instrument, of which the following is a copy.

"For sale or charter, one boom main sail, one lower steering sail, one middle stay sail, and one top gallant stay sail. The *Snow Fortitude*, A 1, British built, copper bolted, and new coppered in 1813, admeasures per register two hundred and seventy-seven tons, is well calculated for any trade where a vessel of her dimensions is wanted, lying in the Surrey canal. Inventory (here followed an inventory of stores, etc.) Sold the within-mentioned ship to Messrs. Kain and Son (thereby meaning G. J. Kain). W. Dodds." On the 28th of October, 1816, the testator received the said £1650, and duly executed a bill of sale of the said ship to the said G. J. Kain, containing the usual covenants, but which did not describe the *Fortitude* as copper bolted. On the 14th of September, 1818, Kain having expended a considerable sum of money upon the *Fortitude*, agreed to

sell her to J. Shepherd, according to printed particulars, substantially the same as those already set out. At the foot of those particulars, G. J. Kain wrote "I agree to sell Mr. Shepherd the Fortitude, with all her stores, as per inventory, for the sum of £2300. G. J. Kain." The Fortitude was conveyed by G. J. Kain to J. Shepherd by bill of sale, in the same form as that by which she had been conveyed by testator to G. J. Kain. In Hilary term, 1821, J. Shepherd commenced an action upon the case against G. J. Kain in the Court of King's Bench in respect of the said last-mentioned sale, and declared upon a warranty that the vessel was copper fastened, and there was a count for a deceitful representation that she was copper fastened. Upon the trial of that action, the jury found a verdict for Shepherd, damages £500, which, together with £142 10s. taxed costs, were paid by Kain to Shepherd before the commencement of this action. Kain's own costs in that action amounted to £140 15s. 6d., and make together with the former sums the aggregate sum of £783 5s. 6d. Kain gave no notice of the action of Shepherd *v.* Kain to Dodds or his executors. At the time of the sale of the ship by W. Dodds to Kain, the ship was not copper bolted.

ABBOTT, C. J. . . . [After stating the facts, the learned Chief Justice proceeded:] Upon this case the question is, whether the plaintiff has proved a promise according to his declaration. We think he has not. The first instrument, which contains a description of the ship as copper bolted, and an inventory of her furniture, and concludes with the words, "Sold the within-mentioned ship to Messrs. Kain and Son. W. Dodds." cannot in our opinion be regarded as an instrument of contract. It is invalid either as a conveyance or as an agreement to convey the ship, by the register acts, because it does not contain a recital of the certificate of registry. *Biddell v. Leader*, 1 B. & C. 327. And it is imperfect as an instrument of contract, because it does not mention the price, and this defect is not supplied by any fact appearing in the case; for there is no mention of any price as agreed between the parties before or at the time when Dodds the testator delivered the paper to the plaintiff; and the bill of sale mentions the sum of £1650 as the consideration of the sale, but does not mention any prior contract or agreement. We do not, however, rely on this imperfection, the objection arising out of the register act being decisive as to the invalidity of the paper. The bill of sale then is the only instrument of contract, and this does not describe the ship as copper bolted; though it contains covenants for the title and for further assurance. The description of copper bolted in the paper can therefore be considered as a representation only, and not as any part of the contract. The contract is in writing, as every contract for the sale of a ship must be.

Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though

not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination. But if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as a part of the contract. A matter antecedent to and dehors the writing, may in some cases be received in evidence, as showing the inducement to the contract; such as a representation of some particular quality or incident to the thing sold. But the buyer is not at liberty to show such a representation, unless he can also show that the seller by some fraud prevented him from discovering a fault which he, the seller, knew to exist. All this is very clearly laid down in the judgment delivered by the late Lord Chief Justice Gibbs in *Pickering v. Dowson*,¹ and it is decisive of the present case wherein the plaintiff has neither declared upon, nor proved fraud on the part of the defendant's testator, but has declared upon a promise or contract. The postea, therefore, is to be delivered to the defendant.

Judgment for the defendant.

SMITH v. HUGHES.

Queen's Bench of England, June, 1871. L. R. 6 Q. B. 597.

THE case is stated in the opinion.

COCKBURN, C. J. This was an action brought in the county court of Surrey, upon a contract for the sale of a quantity of oats by plaintiff to defendant, which contract the defendant had refused to complete, on the ground that the contract had been for the sale and purchase of old oats, whereas the oats tendered by the plaintiff had been oats of the last crop, and therefore not in accordance with the contract.

The plaintiff was a farmer, the defendant a trainer of racehorses. And it appeared that the plaintiff, having some good winter oats to sell, had applied to the defendant's manager to know if he wanted to buy oats, and having received for answer that he (the manager) was always ready to buy good oats, exhibited to him a sample, saying at the same time that he had forty or fifty quarters of the same oats for sale, at the price of 35s. per quarter. The manager took the sample, and on the following day wrote to say he would take the whole quantity at the price of 34s. a quarter.

Thus far the parties were agreed; but there was a conflict of evidence between them as to whether anything passed at the interview between the plaintiff and defendant's manager on the subject of the oats being old oats, the defendant asserting that he had expressly said that he was ready to buy old oats, and that the plaintiff had

¹ 4 Taunt. 779.

replied that the oats were old oats, while the plaintiff denied that any reference had been made to the oats being old or new.

The plaintiff having sent in a portion of the oats, the defendant, on meeting him afterwards, said, "Why, those were new oats you sent me;" to which the plaintiff having answered, "I knew they were; I had none other," the defendant replied, "I thought I was buying old oats: new oats are useless to me; you must take them back." This the plaintiff refused to do, and brought this action.

It was stated by the defendant's manager that trainers as a rule always use old oats, and that his own practice was never to buy new oats if he could get old.

But the plaintiff denied having known that the defendant never bought new oats, or that trainers did not use them; and, on the contrary, asserted that a trainer had recently offered him a price for new oats. Evidence was given for the defendant that 34s. a quarter was a very high price for new oats, and such as a prudent man of business would not have given. On the other hand, it appeared that oats were at the time very scarce and dear.

The learned judge of the county court left two questions to the jury: first, whether the word "old" had been used with reference to the oats in the conversation between the plaintiff and the defendant's manager; secondly, whether the plaintiff had believed that the defendant believed, or was under the impression, that he was contracting for old oats; in either of which cases he directed the jury to find for the defendant.

It is to be regretted that the jury were not required to give specific answers to the questions so left to them. For, it is quite possible that their verdict may have been given for the defendant on the first ground; in which case there could, I think, be no doubt as to the propriety of the judge's direction; whereas now, as it is possible that the verdict of the jury—or at all events of some of them—may have proceeded on the second ground, we are called upon to consider and decide whether the ruling of the learned judge with reference to the second question was right.

For this purpose we must assume that nothing was said on the subject of the defendant's manager desiring to buy old oats, nor of the oats having been said to be old; while, on the other hand, we must assume that the defendant's manager believed the oats to be old oats, and that the plaintiff was conscious of the existence of such belief, but did nothing, directly or indirectly, to bring it about, simply offering his oats and exhibiting his sample, remaining perfectly passive as to what was passing in the mind of the other party. The question is whether, under such circumstances, the passive acquiescence of the seller in the self-deception of the buyer will entitle the latter to avoid the contract. I am of the opinion that it will not.

The oats offered to the defendant's manager were a specific parcel, of which the sample submitted to him formed a part. He kept the sample for twenty-four hours, and had, therefore, full opportunity of inspecting it and forming his judgment upon it. Acting on his own judgment, he wrote to the plaintiff, offering him a price. Having this opportunity of inspecting and judging of the sample, he is practically in the same position as if he had inspected the oats in bulk. It cannot be said that, if he had gone and personally inspected the oats in bulk, and then, believing—but without anything being said or done by the seller to bring about such a belief—that the oats were old, had offered a price for them, he would have been justified in repudiating the contract, because the seller, from the known habits of the buyer, or other circumstances, had reason to infer that the buyer was ascribing to the oats a quality they did not possess, and did not undeceive him.

I take the true rule to be, that where a specific article is offered for sale, without express warranty, or without circumstances from which the law will imply a warranty—as where, for instance, an article is ordered for a specific purpose—and the buyer has full opportunity of inspecting and forming his own judgment, if he chooses to act on his own judgment, the rule *caveat emptor* applies. If he gets the article he contracted to buy, and that article corresponds with what it was sold as, he gets all he is entitled to, and is bound by the contract. Here the defendant agreed to buy a specific parcel of oats. The oats were what they were sold as, namely, good oats according to the sample. The buyer persuaded himself they were old oats, when they were not so; but the seller neither said nor did anything to contribute to his deception. He has himself to blame. The question is not what a man of scrupulous morality or nice honor would do under such circumstances.

The case put of the purchase of an estate, in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honor would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding.

Mr. Justice Story, in his work on Contracts (Vol. i. s. 516), states the law as to concealment as follows:—"The general rule, both of law and equity, in respect to concealment, is that mere silence with regard to a material fact, which there is no legal obligation to divulge, will not avoid a contract, although it operate as an injury to the party from whom it is concealed." "Thus," he goes on to say (s. 517), "although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee; yet, under the general doctrine of *caveat emptor*, he is not,

ordinarily, bound to disclose every defect of which he may be cognizant, although his silence may operate virtually to deceive the vendee." "But," he continues (s. 518), "an improper concealment or suppression of a material fact, which the party concealing is legally bound to disclose, and of which the other party has a legal right to insist that he shall be informed, is fraudulent, and will invalidate a contract." Further, distinguishing between extrinsic circumstances affecting the value of the subject-matter of a sale, and the concealment of intrinsic circumstances appertaining to its nature, character, and condition, he points out (s. 519), that with reference to the latter, the rule is "that mere silence as to anything which the other party might by proper diligence have discovered, and which is open to his examination, is not fraudulent, unless a special trust or confidence exist between the parties, or be implied from the circumstances of the case." In the doctrine thus laid down I entirely agree.

Now, in this case, there was plainly no legal obligation in the plaintiff in the first instance to state whether the oats were new or old. He offered them for sale according to the sample, as he had a perfect right to do, and gave the buyer the fullest opportunity of inspecting the sample, which, practically, was equivalent to an inspection of the oats themselves. What, then, was there to create any trust or confidence between the parties, so as to make it incumbent on the plaintiff to communicate the fact that the oats were not, as the defendant assumed them to be, old oats? If, indeed, the buyer, instead of acting on his own opinion, had asked the question whether the oats were old or new, or had said anything which intimated his understanding that the seller was selling the oats as old oats, the case would have been wholly different; or even if he had said anything which showed that he was not acting on his own inspection and judgment, but assumed as the foundation of the contract that the oats were old, the silence of the seller, as a means of misleading him, might have amounted to a fraudulent concealment, such as would have entitled the buyer to avoid the contract. Here, however, nothing of the sort occurs. The buyer in no way refers to the seller, but acts entirely on his own judgment.

The case of *Horsfall v. Thomas*,¹ if that case can be considered good law, is an authority in point. In that case a gun which had been manufactured for a purchaser, had, when delivered, a defect in it, which afterwards caused it to burst; yet it was held that, although the manufacturer, instead of making the purchaser acquainted with the defect, had resorted to a contrivance to conceal it, as the buyer had had an opportunity of inspecting the gun, and had accepted it without doing so, and had used it, it was not competent to him to avoid the contract on the ground of fraud. The case has,

¹ 1 H. & C. 90.

however, been questioned, and dissenting altogether from the decision, I notice it only to say that my opinion in the present case has been in no degree influenced by its authority.

In the case before us it must be taken that, as the defendant, on a portion of the oats being delivered, was able by inspection to ascertain that they were new oats, his manager might, by due inspection of the sample, have arrived at the same result. The case is, therefore, one of sale and purchase of a specific article after inspection by the buyer. Under these circumstances the rule *caveat emptor* clearly applies; more especially as this cannot be put as a case of latent defect, but simply as one in which the seller did not make known to the buyer a circumstance affecting the quality of the thing sold. The oats in question were in no sense defective, on the contrary they were good oats, and all that can be said is that they had not acquired the quality which greater age would have given them. There is not, so far as I am aware, any authority for the position that a vendor who submits the subject-matter of sale to the inspection of the vendee, is bound to state circumstances which may tend to detract from the estimate which the buyer may injudiciously have formed of its value. Even the civil law, and the foreign law, founded upon it, which require that the seller shall answer for latent defects, have never gone the length of saying that, so long as the thing sold answers to the description under which it is sold, the seller is bound to disabuse the buyer as to any exaggerated estimate of its value.

It only remains to deal with an argument which was pressed upon us, that the defendant in the present case intended to buy old oats, and the plaintiff to sell new, so that the two minds were not *ad idem*; and that consequently there was no contract. This argument proceeds on the fallacy of confounding what was merely a motive operating on the buyer to induce him to buy with one of the essential conditions of the contract. Both parties were agreed as to the sale and purchase of this particular parcel of oats. The defendant believed the oats to be old, and was thus induced to agree to buy them, but he omitted to make their age a condition of the contract. All that can be said is, that the two minds were not *ad idem* as to the age of the oats; they certainly were *ad idem* as to the sale and purchase of them. Suppose a person to buy a horse without a warranty, believing him to be sound, and the horse turns out unsound, could it be contended that it would be open to him to say that, as he had intended to buy a sound horse, and the seller to sell an unsound one, the contract was void, because the seller must have known from the price the buyer was willing to give, or from his general habits as a buyer of horses, that he thought the horse was sound? The cases are exactly parallel.

The result is that, in my opinion, the learned judge of the county

court was wrong in leaving the second question to the jury, and that, consequently, the case must go down to a new trial.

BLACKBURN and HANNEN, JJ., delivered concurring opinions.

Judgment accordingly.

KUELLING v. LEAN MANUFACTURING COMPANY.

Court of Appeals of New York, November, 1905. 183 N. Y. 78.

THE following statement of the nature of the action and of the facts is taken from the opinion of BARTLETT, J.

The plaintiff is a farmer, residing in East Penfield, Monroe County, in this state; the defendant is a foreign corporation organized under the laws of the state of Ohio, and engaged in the manufacture and sale of farming implements, its manufactory being located at Mansfield, in that state.

A few weeks prior to April, 1902, the defendant sold to the firm of Weaver, Palmer & Richmond, who were engaged in the business of selling agricultural implements in the city of Rochester, a certain road roller, with a tongue to which was attached a team of horses when in use. A few days after this sale the purchasers sold the roller to the firm of Fuller & Barnhart, dealers in agricultural implements at Fairport, Monroe County, in this state. In April, 1902, the plaintiff purchased the road roller of the firm of Fuller & Barnhart, used it a short time in the spring on his farm, stored it in a covered shed until about the first day of the following September, when he had occasion to use it again in the conduct of his ordinary farm work, and while so engaged with two horses attached thereto, the tongue broke, precipitating him from a seat which was attached to the rear end of the tongue immediately over the roller, causing the horses to run away. Plaintiff clung to the reins for a short distance, was compelled to release his hold and the roller, weighing some seven hundred pounds, passed over him, inflicting severe injuries.

This action was brought by the plaintiff against the defendant as the manufacturer of this roller, and is based upon the allegation that in constructing it the defendant "intentionally, wilfully, maliciously, negligently and fraudulently" put into it a tongue made of cross-grained black or red oak which was unfit for that purpose; that the tongue had a knot in it, and in addition a large knothole just in front of the point at which the evener and whiffletrees were attached; that the defendant concealed this knothole with a plug of soft wood nailed in, and then the knot, the plug, the hole, the cross-grain of the wood and the kind of wood used were covered up and concealed by the defendant with putty and paint so that the defects could not be seen by inspection; that the tongue was placed in the

roller so that the knot and plug were on the underside; that the roller by reason of these defects was dangerous to the life and limbs of any person who should use it, and that the defects aforesaid made the tongue so weak that it broke as before stated at the time of plaintiff's injury and was the cause thereof.

The plaintiff was nonsuited and filed exceptions and a motion for a new trial.

VANN, J. One who carelessly labels a deadly poison as a harmless medicine and puts it on the market in that condition is liable to any person who without notice of its dangerous character uses the same to his injury. *Thomas v. Winchester*, 6 N. Y. 397. The manufacturer of a machine not inherently dangerous to human life, but with a defect therein which he pointed out to one who purchased it for his own use and at his request attempted to remedy the defect and then painted it over, is not liable to one who was injured while using the same with the consent of the purchaser. *Loop v. Litchfield*, 42 N. Y. 351.

The first case is typical of those which permit the user of a machine, appliance or article that is inherently dangerous to recover damages from the maker for injuries sustained without notice, and the second of those which deny relief when the machine is not inherently dangerous to human life.

We now have a case before us with a new element, that of deceit on the part of the manufacturer, who intentionally so concealed a defect in a machine not intrinsically dangerous as to thereby make it dangerous and without notice sold it to one, who, as he knew, intended to sell it to any purchaser he could find. The deceit, as the jury might have found, consisted in the complete concealment of a defect, not necessarily dangerous if unconcealed but dangerous when concealed, and putting the implement in this condition on the market, without notice to any one, with the intention that it should be sold and used as a safe implement. The natural result of this conduct was to injure whomsoever might use the implement, whether he was the original purchaser, or any subsequent purchaser, or one who simply used it with the consent of the owner.

A manufacturer has the right to sell a defective machine, if he gives notice of the defect to the purchaser, who in turn has the same right. Neither has the right, however, with furtive intent, to completely conceal the defect and sell the machine as sound and safe, intending it to be used as such by any one into whose possession it might lawfully come, when the natural result would be the infliction of an injury upon any person who used it. By giving currency to the implement as safe, with the intent to deceive not only the purchaser but any user, and yet so covering up the defect as to entirely conceal it, the defendant was guilty of an actionable wrong, as the jury might have found. While the machine was not in-

herently dangerous, that fact is not controlling, for the danger was in the concealed defect in an implement sold as sound, and which not only appeared to be sound, but the maker caused it to so appear with intent to deceive. It would be illogical to hold the maker of a poisonous medicine, who negligently but unintentionally labeled it as an innocent remedy and sold it, liable to any one who used it without notice of its character, but not to hold him liable if he intentionally created a danger in a machine apparently safe, which might be as fatal as poison, and, after concealing it in such a way as to prevent detection, put it on the market. While the danger in the one case is not so great as in the other, still if the natural result would cause bodily harm to a human being, that regard for the safety of life and limb which the common law is so careful to shield, should hold the wrongdoer liable in both. A land roller is an implement not ordinarily dangerous, but one with a defective tongue, when the defect is thoroughly concealed for the purpose of making a better sale, may turn out to be as dangerous as a cartridge loaded with dynamite instead of gunpowder. Liability in this case rests on the simple extension of the well-established principle that the maker of an article inherently dangerous but apparently safe, who puts it on the market without notice, is liable to one injured while using it, to the maker of an article, not inherently dangerous, who made it dangerous by his own act but so concealed the danger that it could not be discovered and put it on the market to be sold and used as safe. The extension is logical and consistent with the authorities, for if the implement is not inherently dangerous, but the use thereof is made dangerous by a defect wrongfully concealed, the result is the same and the motive worse. I concur for reversal.

CULLEN, Ch. J., HAIGHT and WERNER, JJ., concur, and GRAY, J., concurs with BARTLETT, J., only; O'BRIEN, J., absent.

Judgment reversed and new trial ordered.

SMITH v. LAND AND HOUSE CORPORATION.

Court of Appeal of England, 1884. 28 Ch. D. 7.

APPEAL from a judgment by Mr. Justice Denman in favor of the defendants. The action was for specific performance of a contract of sale of a freehold hotel in Walton-on-the-Naze, at first offered for sale at auction by the plaintiffs, with printed particulars set out by the auctioneer, but, no sale being then effected, directly afterwards contracted for at private sale by the contract in suit, under circumstances stated below by Lord Justice Baggallay.

The defendants, on learning that the property was for sale, sent their secretary to see the property and report. He visited the place and reported as follows: "The hotel has been built over forty years, and up to a recent period enjoyed a high reputation as a respectable and thriving hotel. Mr. Fleck, the landlord, from the amount of business he is now doing, can scarcely pay the amount of rent with rates and taxes. It seems to be a mystery in the town itself how Mr. Fleck, with his eyes open, could have been induced to take the hotel at the present rental. The only thing that I can see that can be done with the hotel to make it pay as an investment would be to make the small theatre into a kind of music-hall, and to convert the billiard-room into a kind of casino. The town itself seems to be in the very last stage of decay, from beginning to end." This report was read at a meeting of a committee of the defendants, presided over by Mr. Alderman Knight, which authorized the purchase of the property at a sum larger than was, in fact, paid.

BAGALLAY, L. J. On the 4th of May, 1882, the plaintiffs entered into a contract with the defendants for the sale to them of certain property described in particulars of sale. The property had been offered for sale by auction, but no sale was effected, and, immediately afterwards, this contract was entered into. The purchasers declined to complete, saying that they had been induced by misrepresentation to enter into the contract. Early in October, 1882, this action was commenced by the vendors for specific performance. It was met by a statement of defence, accompanied by a counter-claim for rescission of the contract or compensation. The foundation of the counter-claim is that the property was first described, in the particulars, as held by Fleck, "a very desirable tenant," and then again as "let to Mr. F. Fleck (a most desirable tenant) at a rental of £400 per annum, for an unexpired term of twenty-seven and a half years, thus offering a first-class investment." It is alleged that this was a false representation, for that it was not true that Fleck was a "very desirable" or a "most desirable" tenant. The vendors went into receipt of the rents in January, 1882. We have no evidence as to the receipt of rent which accrued before Lady Day, 1882, but as to the quarter's rent which accrued on that day it is in evidence that it was not paid at once; that a distress was threatened but not put in, and that the tenant paid £30 on the 6th of May, £40 on the 13th of June, and the balance of £30 some time before August, but at what precise time it does not appear. At the date of the auction, on the 4th of August, the midsummer rent had been applied for, but no part of it had been paid. Under this state of things the representation in question was made. It is said that these are words of course, put in by the auctioneer; but I hold it to be the duty of a vendor to see that the property is not untruly described, and I cannot hold him to be excused because a description which the property will not bear has been

inserted by the auctioneer without his instructions. Nor can the auctioneer excuse himself for inserting a false representation by saying that he did not know it to be untrue. I think that Mr. Justice Denman came to a correct conclusion as to there having been a material misrepresentation, for the vendors must have known perfectly well that the tenant did not pay his rent properly, and they, therefore, were not justified in describing him as a very desirable tenant.

We have, then, to consider whether the representation materially influenced the defendants in coming to a conclusion to bid for the property. The evidence on this head is all one way. This evidence¹ is uncontradicted. It is true that in a case of this kind it would be very difficult to find any person who could contradict the evidence, and reliance was placed on the secretary's report. I think that the expressions in this report as to Fleck, from the amount of business he was doing, being hardly able to pay the rent, only mean that, according to the amount of business at present going on, it was difficult to see how Fleck could pay his rent and taxes out of the profits, and that these expressions do not at all tend to show that he was not a desirable tenant, for he might have means which would enable him to go on paying the rent till the business improved. Then Alderman Knight states most positively that, having regard to the surroundings, he should not have purchased but for the representation that Fleck was a very desirable tenant. It must then, in my opinion, be considered that the representation was relied on. Now, a man who paid his rent so irregularly could not properly be represented as a desirable tenant.

After the report had been considered by the directors, the secretary was authorized to attend at the auction and bid up to £5000. The secretary, no doubt, saw that the biddings were going in such a way that he should have a chance of getting a better bargain by private contract. He did not bid, but immediately after the auction, the property not having been sold, he agreed to purchase for £4700. Some observations were made on a conversation alleged to have taken place between the secretary and the auctioneer, tending to show that the former knew something to Fleck's disadvantage. But the secretary, on this occasion, was an agent for another purpose; being directed to buy the property if he could get it for a sum not exceeding £5000, it was no part of his business to regulate his business by what he learned about the tenant. What he may have heard or said on that occasion, when he was only sent as an agent for the purpose of buying on the best terms he could get, not exceeding £5000, cannot be evidence against the directors.

I need not say much as to the cases. In *Scott v. Hanson*, 1 Sim.

¹The evidence of Alderman Knight, that the entire board of directors of the company, of which he was chairman, trusted in the statement in the particulars that Fleck was a "very desirable tenant," when in fact he was at the time, but without the knowledge of the defendants, insolvent.

13; 1 Russ. & M. 128, and *Trower v. Newcome*, 3 Mer. 704, the question was whether there was any misrepresentation or not.

In *Trower v. Newcome* a living was described as likely to become vacant soon, and a statement was made orally that it would become vacant on the death of a person aged eighty-two. This did not amount to a representation that the incumbent's age was eighty-two. *Redgrave v. Hurd*, 20 Ch. D. 1, is in favor of the purchasers. On the facts as found in the present case, I think that Mr. Justice Denman came to a right conclusion.

BOWEN, L. J. I am of the same opinion. The action is by vendors for specific performance, and the purchasers allege that there is in the particulars a misrepresentation which disentitles the plaintiffs to specific performance. To sustain this defence the defendants must prove that there was a material misrepresentation, and that they entered into the contract on the faith of the representation.

Was there, then, a misrepresentation of a specific fact? This partly depends on the question whether, on the construction of the particulars, what they say as to Fleck is a representation of a specific fact, a question which the Court of Appeal has the same means of deciding as the judge in the court below. Whether the purchasers relied upon it is a question of fact which the judge of the court below had better means of deciding than we have, for he saw and heard the witnesses.

In considering whether there was a misrepresentation I will first deal with the argument that the particulars only contain a statement of opinion about a tenant. It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense, then, a statement of a fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best, involves, very often, a statement of a material fact, for he impliedly states that he knows facts which justify his opinion.

Now, a landlord knows the relations between himself and his tenant; other persons either do not know them at all, or do not know them equally well; and if the landlord says that he considers that the relations between himself and his tenant are satisfactory, he really avers that the facts peculiarly within his knowledge are such as to render that opinion reasonable. Now, are the statements here statements which involve such a representation of material facts? They are statements on a subject as to which, *prima facie*, the vendors know everything, and the purchasers nothing. The vendors state that the property is let to a most desirable tenant: what does that mean?

I agree that it is not a guaranty that the tenant will go on paying his rent, but it is to my mind a guaranty of a different sort, and amounts, at least, to an assertion that nothing has occurred in the relations between the landlord and the tenant which can be considered to make the tenant an unsatisfactory one. That is an assertion of a specific fact.

Was it a true assertion? Having regard to what took place between Lady Day and Midsummer, I think that it was not. On the 25th of March, a quarter's rent became due. On the 1st of May it was wholly unpaid, and a distress was threatened. The tenant wrote to ask for time. The plaintiffs replied that the rent could not be allowed to remain over Whitsuntide. The tenant paid on the 6th of May £30, on the 13th of June £40, and the remaining £30 shortly before the auction. Now, could it, at the time of the auction, be said that nothing had occurred to make Fleck an undesirable tenant? In my opinion, a tenant who had paid his last quarter's rent by dribblets under pressure must be regarded as an undesirable tenant.

Treating this, then, as a misrepresentation, did it induce the purchasers to buy? It appears to me that it is in every case a question of fact whether a person is induced to buy by a particular representation. We may obtain valuable hints from reported cases, but none of the cases appear to me to impugn the proposition that the question is one of fact, to be decided on the circumstances of each particular case. A representation in the particulars must be taken as made for the purpose of influencing the purchaser's mind. Then, did the purchaser rely upon it? I cannot quite agree with the remark of the late Master of the Rolls in *Redgrave v. Hurd*, 20 Ch. D. 1, 21, that if a material representation calculated to induce a person to enter into a contract is made to him, it is an inference of law that he was induced by the representation to enter into it; and I think that probably his Lordship hardly intended to go so far as that, though there may be strong reason for drawing such an inference as an inference of fact. But here we are not left to inference. The chairman of the company¹ was called, and swore in the most distinct and positive way that it did influence him, and that but for the representation, he would not have purchased. The judge was at liberty to disbelieve him, but I see no reason why he was bound so to do. His evidence was not shaken on cross-examination, and the judge believed him. He uses the very argument that the property had been examined on behalf of the company as strengthening the statement that the company relied on the representation, for he says the report of the secretary was so unfavorable that but for the representation as to the tenant they would not have bought. *Redgrave v. Hurd*, 20 Ch. D. 1, shows that a person who has made a misrepresentation cannot escape

¹ Alderman Knight.

by saying, "You had means of information, and if you had been careful you would not have been misled."

It was argued that Alderman Knight would not have relied on the representation had he not put on it a construction that it will not bear; viz., that it was a guaranty that the tenant would go on paying the rent. I do not think that he understood it so. I think he merely understood it as a representation that, so far as the vendors knew, the tenant was likely to go on paying the rent for the rest of the term. If we had merely to deal with the evidence of Alderman Knight on paper, I should not feel quite satisfied that we ought to treat it as satisfactory; but as the judge who heard and saw him was satisfied, I think that we ought not to differ from his conclusions.

FRY, L. J., delivered a short concurring opinion.

BISHOP *v.* SMALL.

Supreme Court of Maine, 1874. 63 Maine, 12.

CASE for deceit on the sale of the right to make and vend a patented crank churn for the States of Kentucky and West Virginia, for which plaintiff and one Eaton paid the defendant \$7000, being induced to do so by certain false and fraudulent representations made to them by Small, which are sufficiently stated in the opinion. The plaintiff offered to prove that he bought this right relying upon these statements, that other similar ones were made by the defendant, and that they were false; that he spent six weeks in Kentucky, in a vain effort to introduce the churn into use; that the churn and alleged invention were of no value, and that these representations were made by the defendant with intent to defraud and deceive the plaintiff; but the judge ruled that there were not sufficient allegations in the writ, if all proved, to sustain the action, and ordered a nonsuit. The plaintiff excepted.

PETERS, J. The plaintiff seeks to recover damages for a deceit in the sale of a patent right. The representations of the defendant, relied upon, were substantially these:—that the patent right was a "good thing;" "of great utility and benefit, and popular;" that "it was in great demand, and that the defendant had been offered \$40,000 for it, for the territory of Pennsylvania;" that he had "sold one-quarter of the right for the territory of Pennsylvania, for \$4,000;" that "it had been rapidly sold, and he had sold interests in it as fast as he could travel on the road;" that "he had himself bought additional interests in it at great prices, and that he and others had made large sums of money in making sales of it;" that "the plaintiff could sell it upon the territory for which he was to

have it, and, if he did not succeed, that he would go and sell it for him, and would assure him that he would make a large amount from the transaction." The plaintiff avers that the right was of no value; in no demand; and that it could not be sold, and that the defendant knew it to be so. He does not contend that the article has no efficiency as a churn; but contends that it has no superior advantages in those respects for which it was patented.

We are of the opinion that these representations are not actionable. When analyzed, they seem to consist of the opinion of the defendant as to the value of the property sold; or relate to the price that was given for it; or which had been offered for it; or prices at which it had been sold; or to the future profits that could be made out of it. All the representations complained of were merely loose, exaggerated, vague and indefinite recommendations which a vendor is likely to make of property of this description, which he is desirous to sell, and so plainly so, that a person in the use of ordinary care should not be deceived by them. *Caveat emptor* applies. It is not so much that such representations are not enough to amount to fraud and imposition, but that they are, so to speak, too much for that purpose. Most of them are too preposterous to believe. None of them are representations of facts, affecting the quality of the article sold, known to the vendor, but unknown to the vendee, and such as a vendee using common care would be deceived by. They are only "dealer's talk." This is the well settled doctrine in this State and Massachusetts. *Long v. Woodman*, 58 Maine, 49; *Holbrook v. Conner*, 60 Maine, 578. And see Massachusetts decisions cited and approved in these cases. So far as a contrary doctrine is held in the case of *Ives v. Carter*, 24 Conn. 403, it is not in accord with the cases cited. The late case of *Somers v. Richards*, 46 Vermont, 170, sustains the plaintiff's propositions in the case at bar, but it is clearly at variance with our own decisions. We think the rule adopted by us is the more reasonable and logical one. Any other must be uncertain and indefinite. The case of *Nowland v. Cain*, 3 Allen, 261, cited by the plaintiff, does not militate against the principle of the cases relied upon in support of our conclusion in this case, where the defendant falsely represented the qualities of a horse, when the plaintiff had no opportunity to ascertain the falsehood by any examination. That was not an expression of opinion, but of fact.

The statement of the defendant in this case, not alleged in the writ, but testified to, that he had "churned butter from the butter milk that had been left by another churn," if it amounts to an actionable representation, or has any important bearing upon the rights of the parties, cannot be considered here. The declaration sets out specifically the fraudulent representations relied on, and this is not one of them.

WALTON, DICKERSON, BARROWS and VIRGIN, JJ., concurred.

Exceptions overruled.

PEEK *v.* DERRY.

House of Lords of England, July, 1888. 14 A. C. 337.

APPEAL from a decision of the Court of Appeal. The facts are set out at length in the report of the decisions below, 37 Ch. D. 541. For the present report the following summary will suffice:—

By a special Act (45 & 46 Vict. c. clix.) the Plymouth, Devonport and District Tramways Company was authorized to make certain tramways.

By sect. 35 the carriages used on the tramways might be moved by animal power and, with the consent of the Board of Trade, by steam or any mechanical power for fixed periods and subject to the regulations of the Board.

By sect. 34 of the Tramways Act 1870 (33 & 34 Vict. c. 78), which section was incorporated in the special Act, "all carriages used on any tramway shall be moved by the power prescribed by the special Act, and where no such power is prescribed, by animal power only."

In February, 1883, the appellants as directors of the company issued a prospectus containing the following paragraph:—

"One great feature of this undertaking, to which considerable importance should be attached, is, that by the special Act of Parliament obtained, the company has the right to use steam or mechanical motive power, instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses."

Soon after the issue of the prospectus the respondent, relying, as he alleged, upon the representations in this paragraph and believing that the company had an absolute right to use steam and other mechanical power, applied for and obtained shares in the company.

The company proceeded to make tramways, but the Board of Trade refused to consent to the use of steam or mechanical power except on certain portions of the tramways.

In the result the company was wound up, and the respondent in 1885 brought an action of deceit against the appellants claiming damages for the fraudulent misrepresentations of the defendants whereby the plaintiff was induced to take shares in the company.

At the trial before Stirling, J., the plaintiff and defendants were called as witnesses. The effect given to their evidence in this House will appear from the judgments of noble and learned Lords.

Stirling, J., dismissed the action; but that decision was reversed by the Court of Appeal (COTTON, L. J., SIR J. HANNEN, and LOPES, L. J.), who held that the defendants were liable to make good to the plaintiff the loss sustained by his taking the shares, and ordered an

inquiry, 37 Ch. D. 541, 591. Against this decision the defendants appealed.

LORD HERSCHELL: —

My Lords, in the statement of claim in this action the respondent, who is the plaintiff, alleges that the appellants made in a prospectus, issued by them certain statements which were untrue, that they well knew that the facts were not as stated in the prospectus, and made the representations fraudulently, and with the view to induce the plaintiff to take shares in the company.

“This action is one which is commonly called an action of deceit, a mere common law action.” This is the description of it given by Cotton, L. J., in delivering judgment. I think it important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this because observations made by learned judges in actions for rescission have been cited and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit. Even if the scope of the language used extends beyond the particular action which was being dealt with, it must be remembered that the learned judges were not engaged in determining what is necessary to support an action of deceit, or in discriminating with nicety the elements which enter into it.

There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. *Burrowes v. Lock*, 10 Ves. 470, may be cited as an example, where a trustee had been asked by an intended lender, upon the security of a trust fund, whether notice of any prior incumbrance upon the fund had been given to him. In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defence to the action. Lord Selborne pointed out in *Brownlie v. Campbell*, 5 App. Cas. p. 935, that these cases were in an altogether different category from

actions to recover damages for false representation, such as we are now dealing with.

One other observation I have to make before proceeding to consider the law which has been laid down by the learned judges in the Court of Appeal in the case before your Lordships. "An action of deceit is a common law action, and must be decided on the same principles, whether it be brought in the Chancery Division or any of the Common Law Divisions, there being, in my opinion, no such thing as an equitable action for deceit." This was the language of Cotton, L. J., in *Arkwright v. Newbould*, 17 Ch. D. 320. It was adopted by Lord Blackburn in *Smith v. Chadwick*, 9 App. Cas. 193, and is not, I think, open to dispute.

In the Court below Cotton, L. J., said: "What in my opinion is a correct statement of the law is this, that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false, that is, without any reasonable ground for believing it to be true, he is liable in an action of deceit at the suit of any one to whom it was addressed, or any one of the class to whom it was addressed, and who materially induced by the misstatement to do an act to his prejudice." About much that is here stated there cannot, I think, be two opinions. But when the learned Lord Justice speaks of a statement made recklessly or without care whether it is true or false, that is, without any reasonable ground for believing it to be true, I find myself, with all respect, unable to agree that these are convertible expressions. To make a statement, careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true. And it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the Court may think that there were no sufficient grounds to warrant his belief. I shall have to consider hereafter whether the want of reasonable ground for believing the statement made is sufficient to support an action of deceit. I am only concerned for the moment to point out that it does not follow that it is so, because there is authority for saying that a statement made recklessly, without caring whether it be true or false, affords sufficient foundation for such an action.

That the learned Lord Justice thought that if a false statement were made without reasonable ground for believing it to be true an action of deceit would lie, is clear from a subsequent passage in his judgment. He says that when statements are made in a prospectus like the present, to be circulated amongst persons in order to induce them to take shares, "there is a duty cast upon the director or other person who makes those statements to take care that there are no

expressions in them which in fact are false; to take care that he has reasonable ground for the material statements which are contained in that document which he prepares and circulates for the very purpose of its being acted upon by others."

The learned judge proceeds to say: "Although in my opinion it is not necessary that there should be what I should call fraud, yet in these actions, according to my view of the law, there must be a departure from duty, that is to say, an untrue statement made without any reasonable ground for believing that statement to be true; and in my opinion when a man makes an untrue statement with an intention that it shall be acted upon, without any reasonable ground for believing that statement to be true, he makes a default in a duty which was thrown upon him from the position he has taken upon himself, and he violates the right which those to whom he makes the statement have to have true statements only made to them."

Now I have first to remark on these observations that the alleged "right" must surely be here stated too widely, if it is intended to refer to a legal right, the violation of which may give rise to an action for damages. For if there be a right to have true statements only made, this will render liable to an action those who make untrue statements, however innocently. This cannot have been meant. I think it must have been intended to make the statement of the right correspond with that of the alleged duty, the departure from which is said to be making an untrue statement without any reasonable ground for believing it to be true. I have further to observe that the Lord Justice distinctly says that if there be such a departure from duty an action of deceit can be maintained, though there be not what he should call fraud. I shall have by-and-by to consider the discussions which have arisen as to the difference between the popular understanding of the word "fraud" and the interpretation given to it by lawyers, which have led to the use of such expressions as "legal fraud," or "fraud in law;" but I may state at once that, in my opinion, without proof of fraud no action of deceit is maintainable. When I examine the cases which have been decided upon this branch of the law, I shall endeavor to show that there is abundant authority to warrant this proposition.

I return now to the judgments delivered in the Court of Appeal.

It will thus be seen that all the learned judges concurred in thinking that it was sufficient to prove that the representations made were not in accordance with fact, and that the person making them had no reasonable ground for believing them. They did not treat the absence of such reasonable ground as evidence merely that the statements were made recklessly, careless whether they were true or false, and without belief that they were true, but they adopted as the test of liability, not the existence of belief in the truth of the assertions made,

but whether the belief in them was founded upon any reasonable grounds. It will be seen, further, that the Court did not purport to be establishing any new doctrine. They deemed that they were only following the cases already decided, and that the proposition which they concurred in laying down was established by prior authorities. Indeed, Lopes, L. J., expressly states the law in this respect to be well settled. This renders a close and critical examination of the earlier authorities necessary.

I now arrive at the earliest case in which I find the suggestion that an untrue statement made without reasonable ground for believing it will support an action for deceit. In *Western Bank of Scotland v. Addie*, Law Rep. 1 H. L., Sc. 145, 162, the Lord President told the jury "that if a case should occur of directors taking upon themselves to put forth in their report statements of importance in regard to the affairs of the bank false in themselves and which they did not believe, or had no reasonable ground to believe to be true, that would be a misrepresentation and deceit." Exception having been taken to this direction without avail in the Court of Session, Lord Chelmsford in this House said: "I agree in the propriety of this interlocutor. In the argument upon this exception the case was put of an honest belief being entertained by the directors, of the reasonableness of which it was said the jury, upon this direction, would have to judge. But supposing a person makes an untrue statement which he asserts to be the result of a bona fide belief in its truth, how can the bona fides be tested except by considering the grounds of such belief? And if an untrue statement is made, founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterized as misrepresentation and deceit."

I think there is here some confusion between that which is evidence of fraud and that which constitutes it. A consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges. If the learned Lord intended to go further, as apparently he did, and to say that though the belief was really entertained, yet if there were no reasonable grounds for it, the person making the statement was guilty of fraud in the same way as if he had known what he stated to be false, I say, with all respect, that the previous authorities afford no warrant for the view that an action of deceit would lie under such circumstances. A man who forms his belief carelessly, or is unreasonably credulous, may be blameworthy when he makes a representation

on which another is to act, but he is not, in my opinion, fraudulent in the sense in which that word was used in all the case from *Pasley v. Freeman*, 2 Smith's L. C. 74, down to that with which I am now dealing. Even when the expression "fraud in law" has been employed there has always been present, and regarded as an essential element, that the deception was wilful, either because the untrue statement was known to be untrue, or because belief in it was asserted without such belief existing.

I have made these remarks with the more confidence because they appear to me to have the high sanction of Lord Cranworth. In delivering his opinion in the same case he said: "I confess that my opinion was, that in what his Lordship (the Lord President) thus stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they bona fide believe to be true, I cannot think they can be guilty of fraud because other persons think, or the Court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true."

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

I think these propositions embrace all that can be supported by decided cases from the time of *Pasley v. Freeman*, 2 Smith's L. C.

74, down to *Western Bank of Scotland v. Addie*, Law Rep. 1 H. L., Sc. 145, in 1867, when the first suggestion is to be found that belief in the truth of what he has stated will not suffice to absolve the defendant if his belief be based on no reasonable grounds. I have shown that this view was at once dissented from by Lord Cranworth, so that there was at the outset as much authority against it as for it. And I have met with no further assertion of Lord Chelmsford's view until the case of *Weir v. Bell*, 3 Ex. D. 238, where it seems to be involved in Lord Justice Cotton's enunciation of the law of deceit. But no reason is there given in support of the view; it is treated as established law. The dictum of the late Master of the Rolls, that a false statement made through carelessness, which the person making it ought to have known to be untrue, would sustain an action of deceit, carried the matter still further. But that such an action could be maintained notwithstanding an honest belief that the statement made was true, if there were no reasonable grounds for the belief, was, I think, for the first time decided in the case now under appeal.

In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. Indeed Cotton, L. J., himself indicated, in the words I have already quoted, that he should not call it fraud. But the whole current of authorities, with which I have so long detained your Lordships, shows to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed. And the case of *Taylor v. Ashton*, 11 M. & W. 401, appears to me to be in direct conflict with the dictum of Sir George Jessel, and inconsistent with the view taken by the learned judges in the Court below. I observe that Sir Frederick Pollock, in his able work on Torts (p. 243, note), referring, I presume, to the dicta of Cotton, L. J., and Sir George Jessel, M. R., says that the actual decision in *Taylor v. Ashton*, 11 M. & W. 401, is not consistent with the modern cases on the duty of directors of companies. I think he is right. But for the reasons I have given I am unable to hold that anything less than fraud will render directors or any other persons liable to an action of deceit.

At the same time I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out

by Lord Blackburn in *Brownlie v. Campbell*, 5 App. Cas. at p. 952, a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

It now remains for me to apply what I believe to be the law to the facts of the present case. . . .

I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold. The probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form; by asking ourselves whether a reasonable man would be likely under the circumstances so to believe. I have applied this test, with the result that I have a strong conviction that a reasonable man situated as the defendants were, with their knowledge and means of knowledge, might well believe what they state they did believe, and consider that the representation made was substantially true.

Adopting the language of Jessel, M. R., in *Smith v. Chadwick*, 20 Ch. D. at p. 67, I conclude by saying that on the whole I have come to the conclusion that the statement, "though in some respects inaccurate and not altogether free from imputation of carelessness, was a fair, honest and bona fide statement on the part of the defendants, and by no means exposes them to an action for deceit."

I think the judgment of the Court of Appeal should be reversed.

*Order of the Court of Appeal reversed; order of Stirling, J., restored; the respondent to pay to the appellants their costs below and in this House; cause remitted to the Chancery Division.*¹

LITCHFIELD v. HUTCHINSON.

Supreme Court of Massachusetts, February, 1875. 117 Mass. 195.

TORT for deceit in the sale of a horse. The declaration alleged that the defendant sold the plaintiff a horse, for which the plaintiff paid the defendant \$325; that, to induce the plaintiff to buy said horse, the defendant falsely represented to the plaintiff that said horse was all right and sound every way; that the plaintiff, believing that said representation was true was thereby induced to buy, and

¹ See *McConnell v. Wright*, 1903, 1 Ch. D. 546.

did buy, said horse; but in truth said horse was not all right and sound every way, but was lame and sore forward, and was foundered, and was lame in the fore legs and shoulders, and was unsound, injured, and of little value, all which the defendant then well knew. Answer, a general denial.

Trial in the Superior Court, before Aldrich, J., who allowed a bill of exceptions in substance as follows: There was evidence tending to prove that the defendant made the representations as alleged in the declaration; that they were false and known to the defendant to be false; that the plaintiff relied on these representations, and was induced thereby to purchase the horse of the plaintiff as alleged; and that the horse was then in fact lame and unsound. There was conflicting evidence on all these points. It appeared that the plaintiff paid the defendant \$325 for the horse, and there was evidence tending to show that he was not worth, at the time of the sale, over \$100. The defendant testified that he made no representation, whatever, and that he had owned the horse for three or four weeks before the sale and had worked him almost every day, and did not observe any lameness or know that he was unsound.

Upon this evidence the plaintiff requested the judge to instruct the jury as follows:

"1. If the defendant made a representation of the soundness of the horse as of his own knowledge, and the jury are satisfied that he might have known by reasonable inquiry and examination whether he was sound or not, and the horse was not sound as a matter of fact, and if the plaintiff relied on such representations and was induced thereby to purchase the horse, and thereby sustained damage, the defendant is liable. 2. If the defendant represented that the horse was sound, when as a matter of fact he was unsound, and the plaintiff was by such representation induced to buy the horse, and was thereby injured, then the defendant is liable. 3. If the defendant knew the horse was unsound, and did not make such fact known to the plaintiff, but allowed him to purchase the same at a fair market price as a sound horse, then the defendant is guilty of fraud and deceit, and is liable. 4. If the defendant had no knowledge one way or the other as to the soundness of the horse, and still represented to the plaintiff that he was sound, and he was in fact unsound, that would support the allegation that he made to the plaintiff a false allegation knowingly. 5. If the defendant made the representations to the plaintiff without any knowledge, information or ground of belief, and they were in fact false, that would not differ in its legal effect from an assertion or representation known by the defendant to be false."

The judge refused to give any of these instructions, but instead thereof instructed the jury that if upon all the evidence in the case they were satisfied that the defendant made the representations set forth in the declaration, as matters of fact within his own knowledge,

and they should further find upon the evidence that the representations in any material respect were not true, and that the defendant knew they were false, or that he did not honestly believe them to be true, and that the plaintiff, relying upon them as true, was induced to purchase the horse and pay his money therefor, and was thereby damaged, it would be their duty to return a verdict for the plaintiff. But that the action could not be maintained by merely proving that the defendant had reasonable cause to believe the representations, if any were made, were untrue; the declaration alleging that they were fraudulently made, and that the defendant knew them to be false; and therefore, to support the action, there must be proof of a false representation knowingly made; in other words, there must be a concurrence of fraudulent intent and false representation on the part of the defendant. But that in the sense of the law a false representation is knowingly made not only when the party making it knows it to be false, but also when a party, for a fraudulent purpose, states what he does not believe to be true, even though he may have no knowledge on the subject. To these instructions, and refusals to instruct, the plaintiff excepted.

Other instructions in relation to the materiality of representations, the burden of proof, and the measure of damages were given which were not objected to. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

MORTON, J. This is an action of tort, in which the plaintiff alleges that he was induced to buy a horse of the defendant by representations made by him that the horse was sound, and that the horse was, in fact, unsound and lame, all of which the defendant well knew.

To sustain such an action it is necessary for the plaintiff to prove that the defendant made false representations, which were material, with a view to induce the plaintiff to purchase, and that the plaintiff was thereby induced to purchase. But it is not always necessary to prove that the defendant knew that the facts stated by him were false. If he states, as of his own knowledge, material facts susceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true, and it is no defence that he believed the facts to be true. The falsity and fraud consist in representing that he knows the facts to be true, of his own knowledge, when he has not such knowledge. *Page v. Bent*, 2 Met. 371. *Stone v. Denny*, 4 Met. 151. *Milliken v. Thorndike*, 103 Mass. 382. *Fisher v. Mellen*, 103 Mass. 503.

In the case at bar the plaintiff asked the court to instruct the jury "that if the defendant made a representation of the soundness of the horse, as of his own knowledge, and the jury are satisfied that he might have known by reasonable inquiry and examination whether he was sound or not, and the horse was not sound as a matter of fact, and if the plaintiff relied on such representations, and was induced

thereby to purchase the horse, and thereby sustained damage, then the defendant is liable." We are of the opinion that this instruction should have been given in substance. If the defect in the horse was one which might have been known by reasonable examination, it was a matter susceptible of knowledge, and a representation by the defendant made as of his own knowledge that such defect did not exist, would, if false, be a fraud for which he would be liable to the plaintiff, if made with a view to induce him to purchase, and if relied on by him.

A false representation of this character is sufficiently set forth in the declaration to constitute a cause of action, without the further allegation that the defendant well knew the representations to be false. It is not necessary that all the allegations should be proved if enough are proved to make out a cause of action.

The instructions given upon the subject embraced in this prayer required the plaintiff to prove, not only that the defendant made the false representations alleged, as of his own knowledge, but also, that the defendant knew that they were false, or that he did not honestly believe them to be true. In this respect the instructions were erroneous.

Exceptions sustained.

COWLEY v. SMYTH.

Supreme Court of New Jersey, November, 1884. 46 N. J. L. 380.

THIS suit was brought by a depositor in the Mechanics' and Laborers' Savings Bank in Jersey City, against the defendant, a director of the bank, to recover damages for false representations made by the defendant as to the solvency and condition of the bank, whereby the plaintiff was induced to leave in the bank money he had on deposit, which was lost by reason of the subsequent failure of the bank.

The certificate from the Circuit presents for the advisory opinion of this court the question whether there was error in these propositions in the charge to the jury:

1. That if the defendant made the representations as matter of his own knowledge, and so positively asserted that he knew the fact to be as he represented, and the fact was not as he represented, although he may not have known them to be false, and the plaintiff acted upon the representations, they not being true, and suffered damage, the plaintiff may recover.

2. That if he asserted the fact as to the condition of the bank of his own positive knowledge, and did not in fact know what its condition was, then the plaintiff, acting upon that, and being injured, would be entitled to recover.

DEPUE, J. This action is an action on the case for deceit. There is a distinction between relief, either affirmative or defensive, in courts of equity, on the ground of fraud, and the remedy for fraud in a court of law. Courts of equity grant affirmative relief by way of reformation or cancellation of instruments, and even defensive relief in proceedings to enforce an obligation or liability, on the ground of constructive fraud, such as would afford no relief in law, especially by action for deceit. 2 Pom. Eq., s. 872; *Arkright v. Newbold*, L. R., 17 Ch. Div. 302, 317, 330; *Redgrave v. Hurd*, 20 Id. 1, 12. *Reese River Silver Mining Co. v. Smith*, L. R., 4 H. of L. Cas. 64, in which Lord Cairns held that "if persons make assertions of facts of which they are ignorant, whether such assertions are true or untrue, they become, in a civil point of view, as responsible as if they had asserted that which they knew to be untrue," is an instance of equitable relief by way of rescission. The bill was filed by a subscriber for stock to be relieved from a subscription induced by false representations as to the property of the corporation. In that case, as appears in the report in L. R., 2 Ch. App. 604, the directors issued the prospectus containing the false statement on the faith of representations of the vendor of the property and without any knowledge of their untruth, and a subscriber for stock, who was misled by the representations, was relieved in equity from his subscription. The doctrine of equitable estoppel, or estoppel in pais, which has been adopted by courts of law from the courts of equity, also presents considerations which do not apply to an action for deceit. The theory on which that doctrine is founded is that a party should not be allowed to retract an admission or affirmation which was intended to influence the conduct of another, if the retraction would materially injure the latter. *Phillipsburg Bank v. Fulmer*, 2 Vroom 52, 55; *Campbell v. Nichols*, 4 Id. 81, 87. The cases which hold that an agent who, without competent authority, induces another to contract with him as the agent of a third party, is liable in damages without regard to his moral innocence in the supposition that he had the authority he assumed to have, also rest on a special ground — on the ground of an implied warranty of authority. *Randall v. Trimen*, 16 C. B. 786; *Collen v. Wright*, 8 E. & B. 647, 656; *Richardson v. Williamson*, L. R. 6 Q. B. 276, 279; *Weeks v. Propert*, L. R., 8 C. P. 427. The observation of Lord Hatherly that "if a man misrepresents a fact, to that fact he is bound if any other person, misled by such misrepresentation, acts upon it and thereby suffers damage," was made with respect to cases of this kind. *Beattie v. Lord Ebury*, L. R., 7 H. of L. Cas. 102, 130.

The action of deceit, to recover damages for a false and fraudulent representation, differs in principle from the cases that have been referred to. In such an action a false representation, without a fraudulent design, is insufficient. There must be moral fraud in

the misrepresentation to support the action.¹ *Pasley v. Freeman*,² 3 T. R. 51, and *Haycroft v. Creasy*, 2 East, 92, are the leading cases on this subject. Both of these cases were decided by a divided court. In *Paisley v. Freeman*³ the question arose on a motion in arrest of judgment. The count in the declaration which gave rise to the motion averred that the defendant, "intending to deceive and defraud the plaintiffs, did wrongfully and deceitfully encourage the plaintiffs to sell and deliver to one J. C. F. divers goods . . . upon trust, and did for that purpose . . . falsely, deceitfully and fraudulently assert and affirm to the plaintiffs that the said J. C. F. . . . was a person safely to be trusted and given credit to, and did thereby falsely, fraudulently and deceitfully cause and procure the plaintiffs to sell and deliver the said goods . . . upon trust and credit to the said J. C. F." The count also contained an averment that J. C. F. was not a person safely to be trusted and given credit to, and that the defendant well knew the same. The court held that a false affirmation, made with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit, and that as a matter of pleading, fraudulenter without sciens, or sciens without fraudulenter, would be sufficient, but that the fraud must be proved. *Haycraft v. Creasy* was before the court on a rule for a new trial, after a verdict for the plaintiff. In that case the defendant, to an inquiry by the plaintiff concerning the credit of another, made the representation that the party might safely be credited, and that he spoke this from his own knowledge and not from hearsay. The court (GROSS, LAWRENCE and LEBLANC, JJ., LORD KENYON dissenting) held that the action could not be maintained, it appearing that the representation was made by the defendant bona fide and with a belief of the truth of it. Gross, J., said, "It is true that he (the defendant) asserted his own knowledge upon the subject; but consider what the subject matter was of which that knowledge was predicated. It was concerning the credit of another, which is a matter of opinion. When he used these words, therefore, it is plain that he meant only to convey his strong belief in her credit, founded upon the means he had of forming such opinion and belief. There is no reason for us to suppose that, at the time of making those declarations, *he meant to tell a lie and mislead the plaintiff.*" Lawrence, J., said, "The question is whether, if a person asserts that he knows such a one to be a person of fortune, and the fact be otherwise, although the party making the assertion believed it to be true, an action will lie to recover damages for an injury sustained in consequence of such misrepresentation. . . . Stress has been laid on the defendant's assertion of his own knowledge of the matter; but per-

¹ What the court says, *infra*, as to the evidence by which fraud may be proved, should be carefully noted.

² *Ante*, p. 31.

³ *Slc.*

sons in general are in the habit of speaking in this manner without understanding knowledge in the strict sense of the word in which a lawyer would use it. . . . In order to support the action the representation must be made *malò animo*. It is not necessary that the party should gain anything for himself by it. If he make it with a malicious intention that another should be injured by it, he shall make compensation in damages. But there must be *something more than misapprehension or mistake*." LeBlanc, J., said "by *fraud* I understand an intention to deceive. Whether it be from any expectation of advantage to the party himself, or from ill will towards the other, is immaterial. The question here is whether the defendant's saying that which, critically and accurately speaking, was not true, but not having said it with intention to deceive, brings this case within *Paisley*¹ *v. Freeman*. I think not."

The Court of Queen's Bench departed from the doctrine of *Haycraft v. Creasy* in two cases, and held that an action at law might be maintained for false representations, though there was neither fraud nor negligence. *Fuller v. Wilson*, 3 Q. B. 57; *Evans v. Collins*, 5 Id. 804. But *Wilson v. Fuller* was reversed on error (3 Q. B. 68, 1009), and the question was finally set at rest in the English courts in *Taylor v. Ashton*, 11 M. & W. 401, and *Ormrod v. Huth*, 14 Id. 651. In *Taylor v. Ashton* the suit was against the directors of a banking company for publishing a false report of the condition of the bank. The report had been prepared by the officers of the company, and adopted at a meeting of the directors. The judge charged the jury that they must be satisfied that a fraud — that is, a *moral fraud* — had been committed by the defendants. The jury, under this instruction, found for the defendants, stating, at the same time, that the defendants had been guilty of gross and unpardonable negligence in publishing the report. On motion for a new trial the court held that an untrue representation made for a fraudulent purpose would sustain an action for deceit; that it was not necessary to show that the defendants knew the representation to be false if it was made for a fraudulent purpose, and that the proper question was left to the jury. In delivering the judgment of the court, Parke, B., said, "It was contended that it was not necessary that moral fraud should be committed in order to render these persons liable; . . . that the jury found the defendants not guilty, but, at the same time, expressed their opinion that the defendants had been guilty of gross negligence, and that that, accompanied with a damage to the plaintiff, . . . would be sufficient to give him a right of action. From this proposition," the learned judge added, "we entirely dissent, because we are of opinion that, independently of contract, no one can be made responsible for a representation unless it be *fraudulently* made." In *Ormrod v. Huth* the action was in case for false representations. The suit

¹ Sic.

arose upon a sale of cotton by sample — the cotton delivered not being equal in quality with the sample. The plaintiff's counsel contended that the delivery of samples not corresponding with the bulk was a false representation of the quality of the cotton, which must be considered, in point of law, as fraudulent, as being the *statement of a fact which the party making it did not know to be true*. The judge directed the jury that unless they could see grounds for inferring that the defendants or their brokers were acquainted with the fraud that had been practised in the packing, or had acted in the transaction against good faith or with a fraudulent purpose, the defendants were entitled to a verdict. On error the Court of Exchequer Chamber sustained the charge of the judge. Tindal, C. J., delivering the opinion of the court, said that "the rule to be deduced from all the cases appears to us to be that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty, he cannot recover upon a mere representation of the quality, . . . unless he can show that the representation was bottomed in fraud. If, indeed, the representation was false to the knowledge of the party making it, this would, in general, be conclusive evidence of fraud; but if the representation was honestly made, and believed at the time to be true by the party making it, though not true in point of fact, we think it does not amount to fraud in law." The English courts have considered these decisions as a finality, and it is now there settled that there can be no fraud without dishonest intention — no such fraud as was formerly termed legal fraud. 1 Benj. on Sales (Corbin's ed.), s. 638.

The American cases, as might be expected of a subject so prolific of decisions, are not altogether harmonious. Mr. Pomeroy, speaking of the cases I have cited from the Queen's Bench as holding that a representation, false in fact, if acted upon, would support an action, and that the defendant's liability was independent of his knowledge or ignorance of its actual falsity, says, "This theory admitted the possibility of fraud at law where there was no moral delinquency. It denied that moral wrong was an essential element in the legal conception of fraud. The same view was for a time accepted and adopted by a considerable number of decisions in different American states. These cases have, however, been overruled, and the theory itself abandoned in England, and generally, if not universally, throughout the states of our own country. It is now a settled doctrine of the law that there can be no fraud, misrepresentation or concealment without some moral delinquency. There is no actual legal fraud which is not also a moral fraud." 2 Pom. Eq., s. 884. The English and American cases are fully cited in the notes to *Paisley v. Freeman*, 2 Sm. Lead. Cas. 176-186. They have placed the law on this subject where it was put by *Paisley v. Freeman* and *Haycraft v. Creasy*, and have, I think, upon principle as well as by the great

¹ Sic.

weight of authority, established the law on the rational basis that in the action for deceit, moral fraud is essential to furnish a ground of action.

The principle on which the action for deceit is founded being ascertained, the next consideration is with respect to the proof and the proper instructions upon the evidence; for, whatever the character of the evidence may be — whether it consists of knowledge of the falsity of the representation or some other fraudulent device intended for the purpose of deception — the evidence must be submitted to the jury under proper instructions. And I think much of the apparent conflict in the cases has arisen from the failure to discriminate between the issue to be proved and the force and effect of the evidence presented.

The simplest form in which the question of the sufficiency of proof arises is where the proof is that the representation was false to the defendant's knowledge. The scienter as well as the falsehood being proved, proof of the fraudulent intent is regarded as conclusive. Evidence that the defendant intended no fraud will not be received, and the jury will be instructed to find for the plaintiff, though they should be of opinion that the defendant was not instigated by a corrupt motive of gain for himself, or by a malicious motive of injury to the plaintiff. *Foster v. Charles*, 6 Bing. 396; s. c., 7 Id. 105; *Polhill v. Walter*, 3 B. & Ad. 114; and *Mylne v. Marwood*, 15 C. B. 778, are cases of this kind. In each of these cases the proof was that the representation was false to the knowledge of the defendant. The jury added to its finding an expression of opinion that there was no fraudulent intent, but the court nevertheless entered judgment for the plaintiff on the ground that a wilful falsehood was a fraud. The language of Lord Campbell in *Wilde v. Gibson*, 1 H. of L. Cas. 605, 633, was directed to cases of this aspect; and Jessel, M. R., in a case where it was proved that the representation was untrue to the defendant's knowledge, refused to receive evidence that he in fact believed it to be true. *Hine v. Campion*, L. R., 7 Ch. Div. 344.

In other cases of actionable frauds, the probative force and effect of the evidence to establish the fraudulent intent will depend upon the circumstances of the particular case. This question is presented in a complex form where the defendant has added to a representation — which turns out to be untrue, but was not false to his knowledge — an affirmation that he made the representation as of his own knowledge. In such cases the force and effect of the evidence will depend, in a great measure, upon the nature of the subject concerning which the representation was made. If it be with respect to a specific fact or facts susceptible of exact knowledge, and the subject matter be such as that the affirmation of knowledge is to be taken in its strict sense, and not merely as a strong expression of belief, the falsehood in such a representation lies in the defendant's affirmation that he had the

requisite knowledge to vouch for the truth of his assertions, and that being untrue, the falsehood would be wilful and therefore fraudulent. But where the representation is concerning a condition of affairs not susceptible of exact knowledge, such as representations with respect to the credit and solvency of a third person, or the condition or credit of a financial institution, the assertion of knowledge, as was held in *Haycraft v. Creasy*, "is to be taken *secundum subjectam materiam*, as meaning no other than a strong belief founded upon what appeared to the defendant to be reasonable and certain grounds." In such a case the question is wholly one of good faith. The form of the affirmation will cast the burden of proof on the defendant, but when the evidence is in, the issue is whether the defendant *honestly* believed the representation to be true. In support of such an issue the defendant may, by way of exculpation, resort to evidence not admissible in actions for other kinds of deceit. He may, as in *Haycraft v. Creasy*, give evidence that the person whose ability he affirmed lived in a style, and with such appearances of property and means, as gave assurances of affluence. He may give in evidence the information he had upon the subject. *Shrewsbury v. Blount*, 2 M. & G. 475, and show the general reputation for trustworthiness of the person whose credit he affirmed. *Sheen v. Bumpsted*, 2 H. & C. 193. In fine, he may avail himself of any evidence which may tend to show good faith or probable grounds for his belief, leaving the question to be determined, upon all the evidence, whether his conduct was bona fide — whether, at the time he made the representation, he honestly believed that his representation was true.

The Massachusetts cases cited to support the instruction certified to the court admit the distinction I have referred to. In *Tryon v. Whitmarsh*, 1 Met. 1, which was an action for false and fraudulent representations as to the credit of third persons, whereby the plaintiffs were induced to give them credit, a verdict for the plaintiffs was set aside for the reason that the judge should have instructed the jury that the defendant would not be liable if they were of opinion, from the evidence, that he gave an honest opinion, and believed that the persons recommended were trustworthy. In *Hazard v. Irwin*, 18 Pick. 96, the false representation was by a vendor, on the sale of an engine, with respect to its condition. He made the representation as of his own knowledge. The condition of the engine was a fact the vendor could easily have ascertained. The court (Shaw, C. J.) cited *Haycraft v. Creasy*, and distinguished it from the case in hand in that the subject matter of the representation was "one of fact in respect to which a person can have precise and accurate knowledge, and in respect to which, if he speaks of his own knowledge, and has no such knowledge, his affirmation is essentially false." In *Page v. Bent*, 2 Met. 371, the false representation was in relation to the nature and amount of the assets assigned by the defendants. The condition and

amount of the assets were peculiarly within the knowledge of the defendants. The court (Shaw, C. J.) said, "The principle is well settled that if a person make a representation of a fact as of his own knowledge, in relation to a subject matter susceptible of knowledge, and such representation is untrue, . . . it is a fraud and deceit for which the party making it is responsible. . . . But in a matter of opinion, judgment or estimate, if he states a thing of his own knowledge, if he in fact believes it, and it is not intended to deceive, it is not a fraud, although the matter misstated is not true. The reason is that it is apparent from the subject matter that what is thus stated as knowledge must be considered and understood by the party to whom it is addressed as an expression of strong belief only, because it is a subject of which knowledge, in its strict sense, cannot be had." In *Stone v. Denny*, 4 Met. 151, the action was on a false representation on a sale of property made by the defendant, on a schedule exhibited which he represented as correct of his own knowledge. Dewey, J., in his opinion, referred to the Massachusetts cases and said, "From an examination of those cases and others bearing upon the question, I apprehend, however, that it will be found that no real change has been sanctioned in the great and leading principles of law applicable to cases of deceit, and that now, as formerly, to charge a party in damages for a false representation, . . . it must appear that it was made with a fraudulent intent, or was a wilful falsehood." The illustration he gives is "of one asserting as of his own knowledge a matter of which he has no knowledge, nor any sufficient ground for making the assertion." The subsequent observation of the learned judge, "that if one positively affirms a fact as of his own knowledge, and his affirmation is false, his representation is deemed fraudulent," is unobjectionable as applied to the facts of that case, where, because of the subject matter of the representation, the affirmation of knowledge was to be taken in its strict sense, and not as only a strong expression of belief.

The principle adjudged in *Haycraft v. Creasy* is applicable to actions against directors for false and fraudulent representations concerning the financial condition of the institution in their charge. It was so applied in *Taylor v. Ashton*, which has become a leading case in the English law.¹ The affairs of such an institution must necessarily be entrusted to executive officers and subordinate agents, and the directors generally cannot know, and have not the requisite ability to learn, by their own efforts, the exact condition of the affairs of the company, and it has been found that no vigilance on their part has been adequate to protect these institutions from frauds and speculations covered up and concealed by false entries and false reports. A representation by a director that the institution is in a sound and solvent condition within his own knowledge possesses the legal char-

¹ See *Ante*, pp. 66, 73.

acteristics of the like representation as to the credit and financial ability of a third person, such as was before the court in *Haycraft v. Creasy*, and it must be subject to the same legal rule.

The facts on which this case was founded were these: the plaintiff was a depositor in the bank. About the 1st of August, 1878, there was a rumor in circulation affecting the condition of the bank. The defendant was one of the directors of the bank, and a member of the finance committee. The plaintiff, having heard the rumor, went to the defendant and told him of the rumor in circulation, and that he was a depositor and did not want to lose his money, and proposed to take it out. The defendant said, "It can't be so, unknown to me and Mr. Monks. We are on the finance committee. There can be nothing wrong with that bank unknown to me and Mr. Monks. Don't believe any of these false reports; believe me; take my word for it. The bank is good, paying six per cent — the best in the state. If all that is in Jersey tells you the bank is bad, don't believe it till I tell you." He also said "there was a surplus of over \$6000 after the dividends were paid." The bank continued to pay all demands down to November 1st, 1878, when it went into the hands of a receiver. It was insolvent on the 1st of August, 1878, when these representations were alleged to have been made.

The defendant was a director of the bank from June 8th, 1869, until its suspension in November, 1878, and a member of the finance committee from November 19th, 1877. The duties of the finance committee were to attend to all applications for loans, and to look after the investing of the company's funds. The general charge and government of the bank devolved upon the executive committee, of which the defendant was not a member. There was no evidence that the defendant had actual knowledge of the condition of the bank. On the contrary, the proof was that at a regular meeting of the directors, on the 31st of May, 1877, the president read his statements, showing a surplus of \$6000, and a motion was adopted declaring a dividend of six per cent. The next regular meeting was on the 19th of November, 1877. It appears by the minutes that a statement of the assets and liabilities was read in detail, and a dividend of six per cent. per annum was declared for the six months ending October 31st, 1877. On May 30th, 1878, another meeting of directors was held, at which the minutes of the last meeting were read and approved, and a dividend at a rate of six per cent. for the six months ending April, 1878, was declared. All these dividends were credited, and were paid to such of the depositors as presented their books. The defendant was present at each of these meetings of the directors.

On these facts the defendant was not entitled to the nonsuit he asked for; but he was entitled to a different instruction to the jury. The case cannot be distinguished from *Haycraft v. Creasy and Taylor v. Ashton*, and it should have been left to the jury to say whether,

upon the evidence, the defendant made the representations with a fraudulent purpose to deceive, or whether he made them in good faith and in the honest belief that they were true.

There will be a certificate accordingly.

WILCOX *v.* AMERICAN TEL. & TEL. CO.

Court of Appeals of New York, October, 1903. 176 N. Y. 115.

THE nature of the action and the facts are stated in the opinion.

CULLEN, J. The action was brought in ejectment to recover lands in the highway occupied by the defendant's poles, and for damages. On the trial the plaintiff proved title to the locus in quo and the entry thereon by the defendant and the erection of its poles. The defendant then put in evidence an instrument under seal executed by the plaintiff some years after the original entry on the highway, whereby the plaintiff in consideration of one dollar granted to the defendant the right to construct, operate and maintain its lines over and along the plaintiff's property. The plaintiff admitted his signature to this instrument, but testified that at the time of its execution he was told by an agent of the defendant that he had trimmed one of the plaintiff's trees and wished to pay him a dollar for it; that the agent told him the paper was a receipt for a dollar; that he, the plaintiff, did not read the paper, that he had not his spectacles with him, and that thereupon relying upon the statement of the agent as to its contents he signed the paper. On this evidence the court directed a nonsuit and the judgment entered thereon was affirmed by the Appellate Division by a divided court, Mr. Justice Spring writing for reversal.

The ground on which the learned trial judge disposed of the case, as appears in the opinion rendered by him upon denying the motion for new trial, was that the negligence of the plaintiff in failing to read the paper which he signed precluded him from attacking its validity. We think no such rule of law prevails in this state, though there may be dicta in the text books and decisions in other jurisdictions to that effect. It was expressly repudiated by this court in *Albany City Savings Institution v. Burdick*, 87 N. Y. 40, where Judge Earl said: "It is certainly not just that one who has perpetrated a fraud should be permitted to say to the party defrauded when he demands relief that he ought not to have believed or trusted him. Where one sues another for negligence, his own negligence contributing to the injury will constitute a defence to the action; but where one sues another for a positive, wilful wrong or fraud, negligence by which the party injured exposed himself to the wrong or fraud will

not bar relief." See, also, *Welles v. Yates*, 44 N. Y. 525; *Smith v. Smith*, 134 N. Y. 62. It is true that in the opinion delivered in the *Smith* case Judge Landon refers to the relations of confidence between the parties, but only as affecting the credibility of the plaintiff's story that she executed the instrument relying on the defendant's statements as to its contents. The decision did not proceed on any ground of trust relations between the parties. On the contrary, the learned judge said: "The learned counsel for the defendant cites numerous cases, mostly from other states, to support his contention that plaintiffs' negligence in not reading the deed defeats their appeal to equity to relieve them from it. The law of this state as stated in *Albany City Savings Institution v. Burdick* is not so harsh as in some of the cases cited. It does not, in cases like this, impute inexcusable negligence to that omission of vigilance and care procured by the fraud of the wrongdoer." In the other cases cited there was no relation of trust between the parties, but merely that of vendor and purchaser. In a case where a third party has parted with value on the faith of the instrument executed by a person, the question of negligence leading to the execution of the instrument might be material (see opinion of Gray, J., in *Marden v. Dorthy*, 160 N. Y. 60), but it can have no relevancy in favor of the party who it is alleged committed the fraud. The credibility of the plaintiff's statement was for the jury; if the trial judge deemed it unreliable he might have set aside a verdict based upon it, but that did not authorize him to withdraw the case from the jury or to direct a verdict or a nonsuit. *McDonald v. Met. Street Ry. Co.*, 167 N. Y. 66.

The practice adopted by the plaintiff was entirely proper. He was not obliged to appeal to a court of equity for relief against the deed, but when it was set up to defeat his claim he could avoid its effect by proof of the fraud by which it was obtained. *Kirchner v. New Home Sewing Machine Co.*, 135 N. Y. 182. Nor was he obliged to return the dollar paid to him on its execution. The plaintiff does not attempt to rescind a contract as induced by fraud; the charge by him relates, not to the contract, but to the instrument which purports to represent the contract. In such a case the return of the consideration is unnecessary. *Cleary v. Municipal Electric Light Co.*, 19 N. Y. Supp. 951; affirmed on opinion below, 139 N. Y. 643.

The judgment should be reversed and a new trial granted, costs to abide the event.

O'BRIEN, BARTLETT and WERNER, JJ., concur; PARKER, Ch. J., not sitting; GRAY, J., not voting; HAIGHT, J., dissents.

Judgment reversed, etc.

HENRY *v.* DENNIS. HENRY *ET AL.* *v.* DENNIS.

Supreme Court of Maine, January, 1901. 95 Maine, 24.

Two actions for deceit tried together. The facts are stated in the opinion.

WISWELL, C. J. For some time prior to May 1, 1896, Henry, the plaintiff in one of these suits, had been engaged in the wool business alone, under the name of W. S. Henry, Jr. & Co. On that day he formed a copartnership in the same business with one Charles C. Parsons and the business was subsequently carried on in the firm name of Henry & Parsons. But after the formation of the firm, Mr. Henry continued his individual business, in the name of W. S. Henry, Jr. & Co., to the extent of selling from time to time a quantity of wool which he had on hand at the time of the formation of the copartnership.

On August 15, 1896, after the formation of the firm of Henry & Parsons, but while Mr. Henry was still selling on his own account the wool which he previously had on hand and which had not been turned over to the firm, Henry wrote a letter to the Gardiner Woolen Company, in which he referred to an order for wool just received and in which he says: "At Mr. W. D. Eaton's request we sent you the little lot without any knowledge of your financial standing, but if we are to continue to ship you wool on 60 days time, we feel justified in informing ourselves in that respect and we presume that you would prefer to have us inquire directly of you than of outside parties. . . . Will you kindly favor us with full particulars which we trust will warrant a continuation of our business relations to our mutual benefits." This letter was dictated by Mr. Henry, as shown by the letter, but was signed in the name of W. S. Henry, Jr. & Co.

In reply to this letter of inquiry, the defendant, to whom the letter was turned over for reply, under date of August 24, 1896, wrote a letter directed to W. S. Henry & Co., which, it is claimed, contained false and material representations as to the financial standing and condition of the Gardiner Woolen Company, which were subsequently acted upon by Mr. Henry, both individually and as a member of the firm of Henry & Parsons, by making sales to the Woolen Company on credit, upon his own account and upon that of the firm. The plaintiffs, Henry in one case and Henry & Parsons in the other, being unable to collect of the Woolen Company the amounts due them, because of its insolvency, brought these two actions to recover for the injuries sustained by them by reason of the alleged misrepresentations of the defendant.

The two cases were tried together and the jury found against the defendant in both cases. The only question now presented by the

exceptions is, whether or not the representations contained in the defendant's letter directed to W. S. Henry & Co. could have been so acted upon and relied upon by Mr. Henry as a member of the firm of Henry & Parsons, that the defendant would be liable to that firm for any injury sustained by it on account thereof, as well as to Henry individually for any injury sustained by him for the same reason.

It is urged in behalf of the defendant that he should not be and is not liable to the firm of Henry & Parsons for any misrepresentations contained in that letter, because the letter was not directed to the firm and because there was no privity between it and the defendant. The case shows that the defendant did not know of the existence of Mr. Parsons or of the firm of Henry & Parsons. But Henry was the active member of the firm and the one who made these sales upon credit to the Woolen Company, and the jury must have found that Henry was induced to make these sales upon credit, both for himself and for the firm, by the representations contained in the defendant's letter, and that in making the sales and in extending credit to the company, both individually and as a member of the firm, he relied upon these representations.

No authority exactly in point has been called to our attention, but the general principles relative to the liability of a person for injuries caused by such misrepresentations, are well settled. One who makes a misrepresentation must, to render himself liable, have made it with the intention that it should be acted upon by the person to whom it is made or by one to whom he intended it should be communicated, and he is therefore responsible to such persons only as it was intended for.

It is a general rule that a person cannot complain of false representations, for the purpose of maintaining an action of deceit, unless the representations were either made directly to him, with the intention that they should be acted upon by him, or made to another person with the intention that they should be communicated to him and acted upon by him. A representation made to one person with the intention that it shall reach the ears of another and be acted upon by him, and which does reach him, and is acted upon by him to his injury, gives the person so acting upon it the same right to relief or redress as if it had been made to him directly. *Am. & Eng. Encyl. of Law*, 2d. Ed., Vol. 14, pp. 148 and 149, and cases there cited. See also *Hunnewell v. Duxbury*,¹ 154 Mass. 286; *Nash v. Minn. Title Ins. & Trust Co.*, 159 Mass. 437.

Applying these general principles to the particular question here involved, we think that the defendant is liable to the firm for such injury as it suffered in consequence of the misrepresentations contained in his letter, whereby the firm was induced to make sales of

¹ *Post*, p. 86.

its goods to the Woolen Company upon credit. The answer of the defendant to the letter of inquiry was directed to a firm, its object was to obtain credit for the Woolen Company from a firm of which Henry was a member. True, the defendant did not know that Parsons was associated in business with Henry, nor did he know, so far as the case shows, that Henry was also doing business alone under a firm name. But he must have contemplated that the contents of this letter would either be communicated to other members of any firm of which Henry was a partner, in that business, and be acted upon by the firm, or that Henry, acting for a firm, would be induced by his letter to give credit to the Woolen Company. The letter was not only intended for Henry, but as well for those associated with him in that business.

It is of no consequence that the letter was directed to W. S. Henry & Co., when it was in fact relied upon by Henry as a member of the firm of Henry & Parsons. It is not necessary, in order for a defendant to be liable for the consequences of his misrepresentations, that he should know the names of the persons to whom the misrepresentations may be communicated, provided he contemplated that they should be communicated to others and be acted upon by them.

Here, as the case shows, Henry, to whom the misrepresentation was directly made, was induced thereby, as a member of the firm of Henry & Parsons, to sell the firm's goods on credit, and thereby the firm suffered. This is precisely what was within the intention of the defendant; he is consequently liable therefor. This result is in accordance with the ruling of the court at the trial.

Exceptions overruled.

TINDLE *v.* BIRKETT.

Court of Appeals of New York, June, 1902. 171 N. Y. 520.

THE case is stated in the opinion.

O'BRIEN, J. The plaintiffs sought to recover in an action based upon allegations of fraud and deceit practised upon them by the defendant, the price of three bills of goods which they were induced by such fraud to sell to a firm of dealers of which the defendant was a member. The firm was composed of the defendant and another person who died before the trial, and by an order of the court the action was continued against the defendant. At the trial before the court and a jury the plaintiffs were nonsuited and their counsel excepted and this exception presents the question of law in the case. The judgment was affirmed on appeal.

There is practically no dispute about the facts and the question presented by the appeal is whether the plaintiffs' proof did not sustain

or tend to sustain the action. The three bills of goods were sold and delivered by the plaintiffs to the firm at the following dates respectively: November 30, 1898, January 24, 1899, and March 25th, 1899, and amounted in the aggregate to \$901.86. On the 15th day of April following the last sale both of the members of the firm were adjudged bankrupts on their own petition in the Federal court. About eighteen months prior to filing the petition and on the 16th of September, 1897, the defendant, for the purpose of securing a rating by the mercantile agency of R. G. Dun & Co., made and delivered to that agency a statement in writing as to the financial condition of the firm, which showed net assets of \$152,858.22. More than a year thereafter and on the 2d day of November, 1898, in reply to a request from the agency, the defendant wrote a letter in which he practically reiterated his former statement and added that the business of the firm was "large, increasing and profitable." Still later and on March 9th, 1899, just before the purchase of the last two bills of goods from the plaintiffs, a representative of the agency called upon the defendant personally and received from him a verbal statement that there had been no material change in the financial condition of the firm. The agency gave the firm a rating of from \$125,000 to \$200,000, which was maintained and never changed. Substantially the same rating was given to the firm by the Bradstreet agency upon like statements and representations, though made at an earlier date, and the defendant at all times knew that the credit of the firm was so rated in the reference books sent by these agencies to merchants and business people. The plaintiffs had and used these reference books of both agencies in their business, and when defendant applied for credit they consulted these books, and in reliance on the correctness of the rating, without any other knowledge, sold and delivered the goods in question upon credit. The statements upon which these ratings were given, at least as to the Dun agency, were grossly false. The learned court below correctly described this phase of the case in these words which we can very well adopt:

"That the statements upon which the rating of the defendant's firm was based by the mercantile agency of R. G. Dun & Co., were grossly false, and that the plaintiffs relied upon such rating in giving the firm credit for the goods purchased upon the several occasions mentioned, are facts concerning which there is and can be no serious dispute, and had such statements been made directly to the plaintiffs under circumstances which would fairly warrant the assumption that they were so made by way of inducing credit, there would, of course, be no question as to the right of the plaintiffs to maintain an action of this character."

But the learned court held that since these false and fraudulent statements were not made to the plaintiffs personally and directly by the defendant, but to the agencies, and since the plaintiffs never

saw the statements themselves, but only the result of them in the reference books, the action could not be maintained. That one merchant may defraud another under modern business methods just as effectually by a false and fraudulent statement to a commercial agency as in any other way no one can doubt. That the defendant did actually deceive and defraud the plaintiffs by thus putting into circulation in the business world a false, fraudulent and fictitious rating purporting to express his true commercial standing and financial ability is equally clear. Disregarding mere forms and methods, it cannot be doubted that the defendant spoke false and deceitful words to the plaintiffs through the agency just as effectually as if they had met face to face and the statements had been made directly and personally. The buyer of goods may become liable to the seller in fraud, although they have never met or seen each other, and no personal communication that is false or fraudulent has passed between them. If the former does just what this defendant did and procures a fraudulent rating, intending that it should be published to the business community and taken as true, that is a fraud upon the person who relies and acts upon it to his damage. But it is not necessary to argue this question as an original one since it has been deliberately decided by this court.

In *Eaton, C. & B. Co. v. Avery*, 83 N. Y. 31, it was held that when a member of a firm makes statements to a commercial agency, which he knows to be false as to the financial condition of the firm, with the intent that the statements shall be communicated to persons interested in ascertaining the pecuniary responsibility of the firm, intending thus to procure credit and to defraud such persons, and such statements are communicated to one who in reliance thereon sells goods to the firm on credit, an action for deceit may be maintained against the buyer of the goods in favor of the seller who has suffered by the fraud. That decision is controlling in the case at bar, since the two cases are almost identical in their facts, and all the objections urged by the learned court below to a recovery in this case were fully answered upon principle and authority. The court states that the case was new in its facts but old in the principle involved, and the cases cited sustain the statement. The same principle was decided in a more recent case. *Bliss v. Sickles*, 142 N. Y. 647.

The objections urged to a recovery in a case like this are quite untenable. It is said that it would put business men at the mercy of commercial agencies. No one need have any fears of that, since no business man can be affected unless he makes use of such an agency to give information to the business world of his financial condition in order to show that he is worthy of credit, and then it is impossible to harm him unless he makes statements that he knows to be false for a fraudulent purpose, and if he does, there is no reason why he

should not respond to one who has suffered thereby. So, also, it is said that these agencies procure information from other sources than the statement of parties seeking credit. That may be so, but there is little danger that any one will be made liable in fraud for false statements other than his own. If the defendant in this case could show that he never made the statements referred to he would have little difficulty in defeating this action notwithstanding the high rating in the reference books. A party who is really innocent can always protect himself against the unauthorized statements of others. In this case there was clearly a false and excessive rating which was justified by the statements made by the defendant, and it is admitted that these statements were false and fraudulent and that the plaintiffs relied upon the rating in giving the credit. Clearly, this state of facts is a sufficient basis for a charge of fraud and deceit. The proof was certainly sufficient to carry the case to the jury and hence the plaintiffs were improperly nonsuited.

The judgment should be reversed and a new trial granted, costs to abide the event.

PARKER, Ch. J., GRAY, HAIGHT, MARTIN, JJ. (and BARTLETT, J., in an opinion), concur with O'BRIEN, J.; VANN, J., dissents.

Judgment reversed.

HUNNEWELL v. DUXBURY.

Supreme Court of Massachusetts, September, 1891. 154 Mass. 286.

TORT, for fraudulent representations alleged to be made by the defendants as directors of the Electric Advertising Company. The defendants' answer contained a demurrer to the second count of the declaration, which was overruled in the Superior Court; and the defendants appealed to this court. The case was then tried before Pitman, J., and, after a verdict for the plaintiff, the defendants alleged exceptions. The facts appear in the opinion.

BARKER, J. The action is tort for deceit, in inducing the plaintiff to take notes of a corporation by false and fraudulent representations, alleged to have been made to him by the defendants, that the capital stock of the corporation, amounting to \$150,000, had been paid in, and that patents for electrical advertising devices, of the value of \$149,650, had been transferred to it.

From the exceptions, it appears that the corporation was organized in January, 1885, under the laws of Maine, and engaged in business in Massachusetts; that it filed with the commissioner of corporations a certificate containing the above statements, dated August 11, 1885, as required by the St. of 1884, c. 330, § 3,¹ signed

¹ The St. of 1884, c. 330, is an act concerning foreign corporations, except foreign insurance companies, having a usual place of business in this Commonwealth.

by the defendants, with a jurat stating that on that date they had severally made oath that the certificate was true, to the best of their knowledge and belief; that before the plaintiff took the notes the contents of this certificate had been communicated to him by an attorney whom he had employed to examine the records; and that he relied upon its statements in accepting the notes. There was no other evidence of the making of the alleged representations.

The main question, which is raised both by the demurrer to the second count of the declaration and by the exceptions, is whether the plaintiff can maintain an action of deceit for alleged misstatements contained in the certificate. In the opinion of a majority of the court this question should have been decided adversely to the plaintiff. The execution by the defendants of the certificate to enable the corporation to file it under the St. of 1884, c. 330, § 3, was too remote from any design to influence the action of the plaintiff to make it the foundation of an action of deceit.

To sustain such an action, misrepresentations must either have been made to the plaintiff individually, or as one of the public, or as one of a class to whom they are in fact addressed, or have been intended to influence his conduct in the particular of which he complains.

This certificate was not communicated by the defendants, or by the corporation, to the public or to the plaintiff. It was filed with a State official for the definite purpose of complying with a requirement imposed as a condition precedent to the right of the corporation to act in Massachusetts. Its design was not to procure credit among merchants, but to secure the right to transact business in the State.

The terms of the statute carry no implication of such a liability. Statutes requiring similar statements from domestic corporations have been in force here since 1829, and whenever it was intended to impose a liability for false statements contained in them there has been an express provision to that effect; and a requisite of the liability has uniformly been that the person to be held signed knowing the statement to be false. St. 1829, c. 53, § 9. Rev. Sts. c. 38, § 28. Gen. Sts. c. 60, § 30. St. 1870, c. 224, § 38, cl. 5. Pub. Sts. c. 106,

Section 3 is as follows: "Every such company before transacting business in this Commonwealth shall file with said commissioner a copy of its charter or certificate of incorporation, and a statement of the amount of its capital stock, and the amount paid in thereon to its treasurer, and if any part of such payment has been made otherwise than in money the statement shall set forth the particulars thereof, and said statement shall be subscribed and sworn to by its president, treasurer, and by a majority of its directors or officers having the powers usually exercised by directors. All such companies now doing business in this Commonwealth shall file such copy and such statement on or before the first day of October next, provided such business is thereafter continued. Every officer of a corporation which fails to comply with the requirements of this act, and every agent of such corporation who transacts business as such in this Commonwealth shall for such failure be liable to a fine not exceeding five hundred dollars; but such failure shall not affect the validity of any contract by or with such corporation. . . ." See Acts of 1903, ch. 437, § 60.

§ 60, cl. 5.¹ To hold that the St. of 1884, c. 330, § 3, imposes upon those officers of a foreign corporation who sign the certificate, which is a condition of its admission, the added liability of an action of deceit, is to read into the statute what it does not contain.

If such an action lies, it might have been brought in many instances upon representations made in returns required of domestic corporations, and yet there is no instance of such an action in our reports. In *Fogg v. Pew*, 10 Gray, 409, it is held that the misrepresentations must have been intended and allowed by those making them to operate on the mind of the party induced, and have been suffered to influence him. In *Bradley v. Poole*, 98 Mass. 169, the representations proved and relied on were made personally by the defendant to the plaintiff, in the course of the negotiation for the shares the price of which the plaintiff sought to recover. *Felker v. Standard Yarn Co.*, 148 Mass. 226, was an action under the Pub. Sts. c. 106, s. 60, to enforce a liability explicitly declared by the statute.

Nor do we find any English case which goes to the length necessary to sustain the plaintiff's action. The English cases fall under two heads: 1. Those of officers, members, or agents of corporations, who have issued a prospectus or report addressed to and circulated among shareholders or the public for the purpose of inducing them to take shares. 2. Those of persons who, to obtain the listing of stocks or securities upon the stock exchange in order that they may be more readily sold to the public, have made representations to the officials of the exchange, which in due course have been communicated to buyers. *Bagshaw v. Seymour*, 32 L. T. 81. *Bedford v. Bagshaw*, 4 H. & N. 538. *Watson v. Earl of Charlemont*, 12 Q. B. 856. *Clarke v. Dickson*, 6 C. B. (N. S.), 453. *Jarrett v. Kennedy*, 6 C. B. 319. *Campbell v. Fleming*, 1 A. & E. 40. *Peck v. Derry*, 37 Ch. D. 541, and 14 App. Cas. 337.² *Angus v. Clifford*, 1891, 2 Ch. 449. In these cases the representations were clearly addressed to the plaintiffs among others of the public or of a class, and were plainly intended and calculated to influence their action in the specific matter in which they claimed to have been injured. So, too, in the American cases relied on to support the action. *Morgan v. Skiddy*, 62 N. Y. 319. *Terwilliger v. Great Western Telegraph Co.*, 59 Ill. 249. *Paddock v. Fletcher*, 42 Vt. 389. The numerous cases cited in the note to *Pasley v. Freeman*,³ in 2 Smith's Lead. Cas. (9th Am. ed.), 1320, are of the same character.

In the case at bar, the certificate was made and filed for the definite purpose, not of influencing the public, but of obtaining from the State a specific right, which did not affect the validity of its contracts, but merely relieved its agents in Massachusetts of a penalty. It was not

¹ Acts of 1903, ch. 437, § 34.

² Ante, p. 60. ³ Ante, p. 31.

addressed to or intended for the public, and was known to the plaintiff only from the search of his attorney. It could not have been intended or designed by the defendants that the plaintiff should ascertain its contents and be induced by them to take the notes. It is not such a representation, made by one to another with intent to deceive, as will sustain the action. Its statements are in no fair sense addressed to the person who searches for, discovers, and acts upon them, and cannot fairly be inferred or found to have been made with the intent to deceive him.

This view of the law disposes of the case, and makes it unnecessary to consider the other questions raised at the trial.

Demurrer and exceptions sustained.

ENFIELD v. COLBURN.

Supreme Court of New Hampshire, June, 1884. 63 N. H. 218.

CASE. The declaration alleged that the defendant falsely and fraudulently made a claim upon the town for damages to his horse while travelling on a highway in said town, and falsely stated to the officers of the town that his horse had been injured through the insufficiency of the highway, and falsely swore to an affidavit stating the particulars of said injury, which he filed with the town-clerk of said town, "and said town, relying upon said false and fraudulent representations, so made by said defendant, incurred large expense in investigating the facts represented by said defendant, and found said representations to be false, and that said defendant's horse was not injured through the insufficiency of the highway in said town as said defendant well knew." The defendant demurred.

CARPENTER, J. A mere naked lie — a falsehood — though told with intent to deceive, upon which nobody acts, and by which nobody is deceived, is not actionable. The declaration alleges, in substance, that the defendant falsely and fraudulently represented that he had a valid claim against the plaintiffs for damages, that the plaintiffs relied upon the representations, and that they investigated them at a large expense and found them to be false. One or the other of the last two allegations is as untruthful as the representations are claimed to be: both cannot be true. If the plaintiffs relied upon the representations, they did not investigate them: if they investigated them, they did not rely upon them. It is a perversion of language to say that they did both. The averments are incurably repugnant, and neither of them can be rejected as surplusage.

If the inquiry had resulted in favor of, instead of against, the validity of the defendant's claim, and if, relying upon the result of

the examination and not upon the representations, the plaintiffs had paid the demand, they could maintain no action, however unfounded the claim and however false and fraudulent the defendant's representations might be. He only who has trusted in and acted upon a falsehood to his injury can maintain an action. It is upon this principle that no action lies for false representations of facts which are equally open to the observation and knowledge of both parties.

If this declaration can be sustained, a plaintiff who makes and institutes a suit upon a false and fraudulent claim, and is beaten, must not only satisfy the judgment against him for costs, but is also liable to an action on the case; and, generally, one may recover the cost of detecting and defeating any fraud which may be attempted upon him. There is no precedent for such an action. It is always at a party's option to act upon the faith of statements made to him, or upon his own judgment of the facts after making full inquiry. If, where he does the latter and makes a mistake, another is not answerable for his blunder, whatever pains he may have taken to lead him into it, still less should he be punished if by reason of the inquiry no mistake is committed. It is the damages which result from acting upon false representations as if they were true, and not the expense of detecting their falsity, which a plaintiff is entitled to recover.

STANLEY, J., did not sit: the others concurred.

Demurrer sustained.

FOTTLER v. MOSELEY.

Supreme Court of Massachusetts, June, 1901. 179 Mass. 295.

ACTION for deceit. The facts are stated in the opinion.

At the trial, a verdict was directed for the defendant, and the plaintiff alleged exceptions.

HAMMOND, J. The parties to this action testified in flat contradiction of each other on many of the material issues, but the evidence in behalf of the plaintiff would warrant a finding by the jury, that on March 25, 1893, the plaintiff, being then the owner of certain shares of stock in the Franklin Park Land and Improvement Company, gave an order to the defendant, a broker who was carrying the stock for him on a margin, to sell it at a price not less than \$28.50 per share; that on March 27 the defendant, for the purpose of inducing the plaintiff to withdraw the order and refrain from selling, represented to the plaintiff that the sales which had been made of said stock in the market had all been made in good faith and had been "actual true sales throughout;" that these statements were made as of the personal knowledge of the defendant, and that the plaintiff, believing them to be true and relying upon them, was thereby induced

to and did cancel his oral order to the defendant to sell, and did refrain from selling; and that the statements were not true as to some of the sales in the open market, of which the last was in December, 1892, and that the defendant knew it at the time he made the representations. The evidence would warrant a further finding that in continuous reliance upon such representations the plaintiff kept his stock, when he otherwise would have sold it, until the following July, when its market value depreciated and he thereby suffered loss. The defendant, protesting that he made no such representation and that the jury would not be justified in finding that he had, says that even upon such a finding the plaintiff would have no case. He contends that the representation was not material, that a false representation to be material must not only induce action but must be adequate to induce it by offering a motive sufficient to influence the conduct of a man of average intelligence and prudence, and that in this case the representation complained of, so far as it was false, was not adequate to induce action because the fictitious sales were so few and distant in time, and that therefore it was not material.

It may be assumed that the plaintiff desired to handle his stock in the manner most advantageous to himself, and that the question whether he would withdraw his order to sell was dependent, somewhat, at least, upon his view of the present or future market value of the stock; and upon that question a man of ordinary intelligence and prudence would consider whether the reported sales in the market were "true sales throughout" or were fictitious, and what was the extent of each. It is true that a corporation may be of so long standing and of such a nature, and the number of shares so great and the daily sales of the stock in the open market so many and heavy, that the knowledge that a certain percentage of the sales reported are not actual business transactions would have no effect on the conduct of an ordinary man. On the other hand a corporation may be so small and of such a nature and have so slight a hold on the public, and the number of its shares may be so small and the buyers so few, that the question whether certain reported sales are fictitious may have a very important bearing upon the action of such a man. Upon the evidence in this case, we cannot say, as matter of law, that the representation so far as false was not material. This question is for the jury, who are to consider it in the light of the nature of the corporation and its standing in the market, and of other matters, including such as those of which we have spoken.

It is further urged by the defendant that one of the fundamental principles in a suit like this is that the representation should have been acted upon by the complaining party and to his injury; that at most the plaintiff simply refrained from action, and that "refraining from action is not acting upon representation" within the meaning of the rule; and further that it is not shown that the damages,

if any, suffered by the plaintiff are the direct result of the deceit.

Fraud is sometimes defined as the "deception practised in order to induce another to part with property or to surrender some legal right," Cooley, Torts (2d ed.) 555, and sometimes as the deception which leads "a man into damage by wilfully or recklessly causing him to believe and act upon a falsehood." Pollock, Torts (Webb's ed.) 348, 349. The second definition seems to be more comprehensive than the first, (see for instance *Barley v. Walford*, 9 Q. B. 197, and *Butler v. Watkins*, 13 Wall. 456), and while the authorities establishing what is a cause of action for deceit are to a large extent convertible with those which define the right to rescind a contract for fraud or misrepresentation and the two classes of cases are generally cited without any express discrimination, still discrimination is sometimes needful in the comparison of the two classes of cases. Pollock, Torts, (Webb's ed.), 352.

It is true that it must appear that the fraud should have been acted upon. It is a little difficult to see precisely what is meant by the contention that "refraining from action is not acting upon representation." If by refraining from action it is meant simply that the person defrauded makes no change but goes on as he has been going and would go whether the fraud had been committed or not, then the proposition is doubtless true. Such a person has been in no way influenced, nor has his conduct been in any way changed by the fraud. He has not acted in reliance upon it. If, however, it is meant to include the case where the person defrauded does not do what he had intended and started to do and would have done save for the fraud practised upon him, the proposition cannot be true. So far as respects the owner of property, his change of conduct between keeping the property on the one hand and selling it on the other, is equally great, whether the first intended action be to keep or to sell; and if by reason of fraud practised upon him the plaintiff was induced to recall his order to sell, and, being continuously under the influence of this fraud, kept his stock when, save for such fraud, he would have sold it, then with reference to this property he acted upon the representation within the meaning of the rule as applicable to cases like this. *Barley v. Walford*, 9 Q. B. 197. *Butler v. Watkins*, 13 Wall. 456.

The cases of *Lamb v. Stone*,¹ 11 Pick. 527, *Wellington v. Small*, 3 Cush. 145, and *Bradley v. Fuller*, 118 Mass. 239, upon which the defendant relies, are not authorities for the proposition that "refraining from action is not acting upon representation."

As to whether the loss suffered by the plaintiff is legally attributable to the fraud, much can be said in favor of the defendant, and a verdict in his favor on this as well as on other material points might be the one most reasonably to be expected upon the evidence,

¹ Ante, p. 20.

especially when it is considered that during the years 1892 and 1893 the plaintiff was a director in the company; but we cannot decide the question as a matter of law. If the fraud operated on the plaintiff's mind continuously, up to the time of the depreciation of the stock in June, 1893, so that he kept his stock when otherwise he would have sold it, and such was the direct, natural and intended result, then we think the causal relation between the fraud and the loss is sufficiently made out. See *Reeve v. Dennett*. 145 Mass. 23, 29.

Exceptions sustained.

FREEMAN *v.* VENNER.

Supreme Court of Massachusetts, June, 1876. 120 Mass. 424.

TORT. Writ dated December 22, 1873. The declaration alleged that on July 16, 1873, James W. Cox and Judah H. Cox made a negotiable promissory note payable to the plaintiff or order in the sum of \$3500, in two years from date, secured by mortgage of land in New Hampshire; that on November 21, 1873, the plaintiff and the defendant entered into an agreement in writing, a copy of which was annexed, and which was in substance that the defendant agreed to sell and the plaintiff to purchase a parcel of land in Boston, and in payment therefor to assign to the defendant a certain mortgage held by him on land in New Hampshire for the sum of \$3500, the deeds to be passed on December 1, 1873; that on that day the plaintiff assigned the mortgage mentioned to the defendant, "and by mistake and inadvertence on his part and through the false and fraudulent representations of the defendant he indorsed said note in blank," and that the defendant, upon request of the plaintiff, refused to allow him to qualify such indorsement, and against the objection of the plaintiff negotiated the same to Thomas P. Tenney, a bona fide holder for value, and also transferred said mortgage to him, and that he is held to pay the same. The answer contained a general denial, and alleged that the plaintiff at the commencement of the action had paid nothing and had sustained no damage by reason of such indorsement.

At the trial in the Superior Court, before Pitman, J., without a jury, it appeared that at the time of indorsing the note, December 1, 1873, the plaintiff also intentionally assigned to the defendant the mortgage given to secure said note, and, by the same assignment, the note and the debt secured by the mortgage; that, before commencing his action, or at any time before said trial, the plaintiff had made no payment on account or by reason of the indorsement; that, before the commencement of this action and before the maturity of the note, the makers thereof had become bankrupts; that since the commencement a semi-annual instalment of interest had become due;

that Tenney had caused the real estate to be sold by virtue of the power contained in the mortgage, had applied a part of the proceeds of the sale in liquidation of that interest, and, since the maturity of the note, had applied the balance of the proceeds in part payment of the note, and had commenced an action against the plaintiff to recover the balance of said note (due demand having been made and notice given) which action is now pending.

“Upon this evidence, the judge found that from the agreement of the parties the defendant was not entitled to have the personal liability of the plaintiff as indorser of the note, and that the plaintiff through inadvertence and ignorance of the law and by the misdirection of the defendant, wrote his name so as to become an unqualified indorser of said note; that, as soon as the plaintiff became aware of the obligation he had assumed, and before the defendant had negotiated the note or altered his position in any way, the plaintiff demanded that the defendant should allow him to qualify his indorsement so that it should merely transfer the title according to the agreement, that the defendant refused, and thereupon the plaintiff forbade him to negotiate the note; but the defendant notwithstanding, and in defiance, immediately negotiated the note before maturity to a bona fide holder for value.”

Upon the foregoing evidence and findings, the defendant requested the judge to rule that the plaintiff could not maintain his action, but, if he could, that he was entitled to recover only nominal damages. The judge declined so to rule, and held that, upon this evidence and these findings, the defendant was liable for the conversion of the note, and that the measure of the plaintiff's damages was the amount which the plaintiff was legally compellable to pay to the holder of the note, namely, the face of the note and interest, less the amount realized from the sale under the mortgage, treating the same as a partial payment, and gave judgment for the sum of \$2465.68. The defendant alleged exceptions.

COLT, J. It was found as matter of fact by the court in a trial without a jury, that the defendant was not, by the terms of the agreement, relied on by the plaintiff, and made part of the declaration, entitled to hold the plaintiff liable as indorser of the Cox note; and that the plaintiff indorsed the same through inadvertence, ignorance of the law and misdirection of the defendant. The agreement, however, provided for the assignment of the plaintiff's right and interest in the mortgage given to secure the note in question. The court ruled that upon the evidence the defendant was liable for the conversion of the note, and that the measure of damages was the amount which the plaintiff was legally liable to pay the holder of it; namely, the amount due on the same, less the amount realized from the mortgage; and judgment was rendered accordingly.

The difficulty with this ruling is, that upon the facts disclosed there

was no conversion of the note. By the terms of the agreement, the defendant was entitled to an assignment of the mortgage debt. The indorsement of the plaintiff transferred the legal title in the note to the person to whom it legally belonged. The gist of the action is the fraud of the defendant in wrongfully obtaining the unrestricted indorsement of the plaintiff, and afterwards, against his objection, negotiating the note to a holder for value without notice. The plaintiff upon his own showing could not impeach the defendant's title to the note and mortgage, or his right to transfer that title to another. The rule of damages for the conversion of a promissory note cannot be applied to such an action. *Mercer v. Jones*, 3 Camp. 477. 2 Greenl. Ev. s. 649.

The further objection is, that treating this as an action to recover damages for an alleged fraud, the plaintiff shows no damages sustained at the time his action was commenced. It was then uncertain and contingent whether he would ever be called on to pay the note. It was payable to the plaintiff or order in two years, and was dated in July, 1873, shortly before its transfer by his indorsement to the defendant. The liability of the plaintiff depended on the failure of the makers to pay and the giving of due notice to him as indorser. No payment has in fact ever been made by him. If the holder received his pay from the makers through the mortgage security or otherwise, the plaintiff will have suffered no actionable wrong. There will have been no concurrence of damage with fraud, within the rule on which such actions are founded. And as there has been no invasion of the plaintiff's right, no breach of promise, and no interference with his property, there can be no recovery of even nominal damages in this action. *Pasley v. Freeman*, 3 T. R. 51. 2 Smith Lead. Cas. (6th Am. ed.) 157, and notes.

Exceptions sustained.

CHAPTER II.

UNFAIR COMPETITION.

SYKES v. SYKES.

King's Bench of England, Michaelmas Term, 1824. 3 Barn. & C. 541.

CASE. The declaration alleged that the plaintiff, before and at the time of committing the grievances complained of, carried on the business of a shot-belt and powder-flask manufacturer, and made and sold for profit a large quantity of shot-belts, powder-flasks, &c., which he was accustomed to mark with the words "Sykes Patent," in order to denote that they were manufactured by him, the plaintiff, and to distinguish them from articles of the same description manufactured by other persons; that plaintiff enjoyed great reputation with the public on account of the good quality of the said articles, and made great gains by the sale of them, and that defendants, knowing the premises, and contriving, &c., did wrongfully, knowingly, and fraudulently, against the will and without the license and consent of the plaintiff, make a great quantity of shot-belts and powder-flasks, and cause them to be marked with the words "Sykes Patent," in imitation of the said mark so made by the plaintiff in that behalf as aforesaid, and in order to denote that the said shot-belts and powder-flasks, &c., were of the manufacture of the plaintiff, and did knowingly, wrongfully, and deceitfully sell, for their own lucre and gain, the said articles so made and marked as aforesaid, *as and for* shot-belts and powder-flasks, &c., of the manufacture of the plaintiff. Whereby plaintiff was prevented from selling a great quantity of shot-belts, powder-flasks, &c., and greatly injured in reputation; the articles so manufactured and sold by the defendants being greatly inferior to those manufactured by the plaintiff. Plea, not guilty.

At the trial before Bayley, J., at the last Yorkshire assizes, it was proved that some years before the plaintiff's father obtained a patent for the manufacture of the articles in question. In an action afterwards brought for infringing the same, the patent was held to be invalid on account of a defect in the specification; but the patentee, and afterwards the plaintiff, continued to mark the articles with the words "Sykes Patent," in order to distinguish them as their manufactures. The defendants afterwards commenced business, and manufactured articles of the same sort, but of an inferior description, and sold them at a reduced price to the retail dealers. They marked them

with a stamp resembling as nearly as possible that used by the plaintiff, in order that the retail dealers might, and it was proved that they actually did, sell them again, as and for goods manufactured by the plaintiff; but the persons who bought these articles from the defendants, for the purpose of so reselling them, knew by whom they were manufactured. It further appeared that the plaintiff's sales had decreased since the defendants commenced this business.

It was contended for the defendants that the plaintiff could not maintain this action, for that one of the defendants being named Sykes, he had a right to mark his goods with that name, and had also as much right to add the word "patent" as the plaintiff, the patent granted to the latter having been declared invalid. The learned judge overruled the objection, as the defendant had no right so to mark his goods *as and for* goods manufactured by the plaintiff, which is the allegation in the declaration.

It was then urged that the declaration was not supported by the evidence, for that it charged that the defendants sold the goods as and for goods made by the plaintiff; whereas the immediate purchasers knew them to be manufactured by the defendants. The learned judge overruled this objection also, and left it to the jury to say whether the defendants adopted the mark in question for the purpose of inducing the public to suppose that the articles were not manufactured by them but by the plaintiff; and they found a verdict for the plaintiff. Motion for new trial on the ground that the facts proved did not support the declaration.

ABBOTT, C. J. I think that the substance of the declaration was proved. It was established most clearly that the defendants marked the goods manufactured by them with the words "Sykes Patent," in order to denote that they were of the genuine manufacture of the plaintiff; and although they did not themselves sell them as goods of the plaintiff's manufacture, yet they sold them to retail dealers for the express purpose of being resold as goods of the plaintiff's manufacture. I think that is substantially the same thing, and that we ought not to disturb the verdict.

Rule refused.

AMERICAN WALTHAM WATCH COMPANY v. UNITED STATES WATCH COMPANY.

Supreme Court of Massachusetts, March, 1899. 173 Mass. 85.

BILL in equity, filed October 15, 1890, and amended September 22, 1898, to restrain the use of the word "Waltham" on watches made by the defendant, to the detriment of the plaintiff's business as a

manufacturer of watches in Waltham. Hearing before Knowlton, J., who, with the consent of the parties, reported the case for the consideration of the full court. The facts appear in the opinion.

HOLMES, J. This is a bill brought to enjoin the defendant from advertising its watches as the "Waltham Watch" or "Waltham Watches," and from marking its watches in such way that the word "Waltham" is conspicuous. The plaintiff was the first manufacturer of watches in Waltham, and had acquired a great reputation before the defendant began to do business. It was found at the hearing that the word "Waltham," which originally was used by the plaintiff in a merely geographical sense, now, by long use in connection with the plaintiff's watches, has come to have a secondary meaning as a designation of the watches which the public has become accustomed to associate with the name. This is recognized by the defendant so far that it agrees that the preliminary injunction, granted in 1890, against using the combined words "Waltham Watch" or "Waltham Watches" in advertising its watches, shall stand and shall be embodied in the final decree.

The question raised at the hearing, and now before us, is whether the defendant shall be enjoined further against using the word "Waltham," or "Waltham, Mass.," upon the plates of its watches without some accompanying statement which shall distinguish clearly its watches from those made by the plaintiff. The judge who heard the case found that it is of considerable commercial importance to indicate where the defendant's business of manufacturing is carried on, as it is the custom of watch manufacturers so to mark their watches, but nevertheless found that such an injunction ought to issue. He also found that the use of the word "Waltham," in its geographical sense, upon the dial, is not important, and should be enjoined.

The defendant's position is that, whatever its intent and whatever the effect in diverting a part of the plaintiff's business, it has a right to put its name and address upon its watches; that to require it to add words which will distinguish its watches from the plaintiff's in the mind of the general public is to require it to discredit them in advance; and that, if the plaintiff by its method of advertisement has associated the fame of its merits with the city where it makes its wares instead of with its own name, that is the plaintiff's folly, and cannot give it a monopoly of a geographical name, or entitle it to increase the defendant's burdens in advertising the place of its works.

In cases of this sort, as in so many others, what ultimately is to be worked out is a point or line between conflicting claims, each of which has meritorious grounds and would be extended further were it not for the other. *Boston Ferrule Co. v. Hills*, 159 Mass. 147, 149, 150. It is desirable that the plaintiff should not lose custom by reason of the public mistaking another manufacturer for it. It is

desirable that the defendant should be free to manufacture watches at Waltham, and to tell the world that it does so. The two desiderata cannot both be had to their full extent, and we have to fix the boundaries as best we can. On the one hand, the defendant must be allowed to accomplish its desideratum in some way, whatever the loss to the plaintiff. On the other, we think the cases show that the defendant fairly may be required to avoid deceiving the public to the plaintiff's harm, so far as is practicable in a commercial sense.

It is true that a man cannot appropriate a geographical name, but neither can he a color, or any part of the English language, or even a proper name to the exclusion of others whose names are like his. Yet a color in connection with a sufficiently complex combination of other things may be recognized as saying so circumstantially that the defendant's goods are the plaintiff's as to pass the injunction line. *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.* 168 Mass. 154, 156. So, although the plaintiff has no copyright on the dictionary or any part of it, he can exclude a defendant from a part of the free field of the English language, even from the mere use of generic words unqualified and unexplained, when they would mislead the plaintiff's customers to another shop. *Reddaway v. Banham*, 1896, A. C. 199. So the name of a person may become so associated with his goods that one of the same name coming into the business later will not be allowed to use even his own name without distinguishing his wares. *Brinsmead v. Brinsmead*, 13 Times, L. R. 3. *Reddaway v. Banham*, 1896, A. C. 199, 210. See *Singer Manuf. Co. v. June Manuf. Co.*, 163 U. S. 169, 204; *Allegretti Chocolate Cream Co. v. Keller*, 85 Fed. Rep. 643. And so, we doubt not, may a geographical name acquire a similar association with a similar effect. *Montgomery v. Thompson*, 1891, A. C. 271.

Whatever might have been the doubts some years ago, we think that now it is pretty well settled that the plaintiff merely on the strength of having been first in the field may put later comers to the trouble of taking such reasonable precautions as are commercially practicable to prevent their lawful names and advertisements from deceitfully diverting the plaintiff's custom.

We cannot go behind the finding that such a deceitful diversion is the effect and intended effect of the marks in question. We cannot go behind the finding that it is practicable to distinguish the defendant's watches from those of the plaintiff, and that it ought to be done. The elements of the precise issue before us are the importance of indicating the place of manufacture and the discrediting effect of distinguishing words on the one side, and the importance of preventing the inferences which the public will draw from the defendant's plates as they now are, on the other. It is not possible to weigh them against each other by abstractions or general propositions. The ques-

tion is specific and concrete. The judge who heard the evidence has answered it, and we cannot say that he was wrong.

Decree for the plaintiff.

MARSH v. BILLINGS.

Supreme Court of Massachusetts, March, 1851. 7 Cush. 322.

THIS was an action of trespass on the case. The declaration contained two counts, the first of which stated that the plaintiffs, on the 16th of January, 1849, and ever since, had purchased for a valuable consideration, and were possessed of, the sole and exclusive right and privilege of representing and acting for Paran Stevens, the lessee of the hotel or public-house in Boston known as the Revere House, at the station of the Boston and Worcester Railroad Company in Boston, in and about the carriage and transportation for hire of such passengers arriving at the station as should require the services and aid of hackmen and hacks authorized by Stevens to act for and represent him in this behalf, to transport them and their baggage from the station to the Revere House, and of the exclusive right of using, wearing, and placing upon their carriages and servants, stationed at said station, the name, badge, and designation of "Revere House;" and that, to enable them to exercise their said rights and privileges beneficially, the plaintiffs had been put to great outlay and expense, and had bought and maintained two carriages at a great expense, to wit, the sum of four thousand dollars, and had hired and kept divers servants at great wages; and, at the time of the committing by the defendants of the grievances complained of, were used and accustomed to obtain and transport for hire, from the station to the Revere House, a great number of such passengers and their baggage; and by reason of the transportation of such passengers and baggage great profits and advantages had accrued, and still ought to accrue, to the plaintiffs. Yet the defendants, well knowing the premises, but contriving and unjustly intending to injure the plaintiffs in the exercise of their said business or occupation, and to deprive them of great parts of their said profits and advantages,* without the license or consent of the plaintiffs, or of Stevens, and against the will of the plaintiffs, and of Stevens, did unlawfully, on the 16th of January, 1849, and on divers other days since that day, and before the purchase of this writ, keep and maintain, and caused to be kept and maintained, at said station a large number of carriages and servants, with the name, badge, or designation of "Revere House" marked, placed, or worn upon them and each of them, in imitation of and as the name, badge, and designation worn and used by the plaintiffs as aforesaid, and in order to denote to such passengers that said coaches and servants

were authorized by Stevens to transport them and their baggage from the station to the Revere House, and did knowingly and deceitfully represent, and cause their said servants to represent, to such passengers that said coaches and servants were authorized and placed by Stevens at the station, to transport for hire said passengers and their baggage from the station to the Revere House; by means of which a great number, to wit, five hundred, of such passengers were induced to enter the defendants' carriages with their baggage, and to desert and leave the carriages of the plaintiffs, and the plaintiffs thereby lost the profits and advantages which would otherwise have accrued to them from transporting for hire said passengers and their baggage from the station to the Revere House, and were subjected to great loss in their said business or occupation.

The second count was precisely like the first as far as the star (*) above, and then alleged that the defendants did unlawfully, on the 16th of January, 1849, and on divers other days since that day, and before the purchase of this writ, interfere, and cause their servants to interfere, with the plaintiffs, in the exercise of their said business or occupation, and in the obtaining and transportation by the plaintiffs of such passengers and their baggage from the station to the Revere House, insomuch that many passengers, to wit, five hundred, who were then and there about to enter the plaintiffs' carriages, were prevented from so doing, and the plaintiffs were thereby prevented from obtaining and transporting for hire such passengers and their baggage in such plenty as they would otherwise have done, and from realizing the profits and advantages which ought to have accrued to them in their said business and occupation, and were therein subjected to great loss.

At the trial before Bigelow, J., in the Court of Common Pleas, the plaintiffs, to prove their case, called as a witness Paran Stevens, the lessee of the Revere House, who testified that on the first day of May, 1849, he made a verbal agreement with the plaintiffs, by which they agreed to keep coaches at the station of the Boston and Worcester Railroad in Boston, to convey passengers arriving at the station by the "long trains," who might desire to go to the Revere House, and further agreed to keep good horses and coaches, and to employ first-rate drivers, to do the work of conveying passengers, to the acceptance of the passengers and of Stevens; in consideration of which he agreed to employ the plaintiffs to convey all passengers who might wish to go from the Revere House to the station, and authorized the plaintiffs to put on their coaches and on the caps of their drivers, as a badge, the words "Revere House." He further testified that a similar agreement had existed between him and the defendants, from the time when he first opened the Revere House, until the 1st of May, 1849, when it was terminated by him with the assent of the defendants, because the defendants did not do the work to his satisfaction; and

that the defendants, under this agreement, had placed the words "Revere House" on their coaches and on the caps of their drivers.

It further appeared in evidence that after the 1st of May, 1849, and during the times alleged in the plaintiffs' writ, the defendants continued to carry the words "Revere House" on their coaches and on the caps of their drivers; that their coaches and drivers, so marked, were kept at the station of the Boston and Worcester Railroad, and on the arrival of the "long trains" their drivers were in the constant habit of calling out "Revere House," in loud tones, in the presence and hearing of the passengers by said trains. It also appeared that some time in July, 1849, Stevens requested one of the defendants to discontinue the use of the words "Revere House" on their coaches and on the caps of their drivers; but that he refused so to do, saying he had a right to use them.

There was also some evidence that the defendants by their agents on one or more occasions stated to persons desiring conveyance to the Revere House, that they were the agents employed by the "Revere House" or by Mr. Stevens, to convey passengers, and that the plaintiffs were not, or words to that effect, by means of which statements some passengers were diverted from the coaches of the plaintiffs, and induced to go in the coaches of the defendants. Upon this point, however, the evidence was contradictory. One person in the employ of the defendants, called as a witness by the plaintiffs, testified that on one occasion he induced three persons to leave the coach of the plaintiffs and go in the defendants' coach, by stating to them that his coach was the regular coach, and that they had got into the wrong coach. The plaintiffs also offered evidence that the defendants, during the time alleged in the plaintiffs' writ, carried large numbers of passengers from the station to the Revere House.

The plaintiffs, on the foregoing evidence, contended that they had an exclusive right to the use of the words "Revere House" on their coaches and on the caps of their drivers; that these words were in the nature of trade-marks, and that their action would lie, on showing that the defendants had used these words in the manner above stated.

But the judge instructed the jury that no person had the legal right to claim the exclusive privilege of conveying passengers from the station of the Boston and Worcester Railroad to the Revere House; that any person, who saw fit to engage in it, had a right to carry on the business, and to indicate, by suitable signs on his coaches, by badges on the caps of his drivers, and by calling at the station, in the hearing of passengers, the place to and from which he conveyed passengers; that the plaintiffs in this case could not recover damages of the defendants, merely by showing that the defendants had on their coaches, and on the caps of their drivers, the words, "Revere House," and that they had called out "Revere House," in the hearing of passengers in the station, and thereby obtaining the con-

veyance of passengers from the station to the Revere House. But that if, on the whole evidence before the jury, the burden of proof being on the plaintiffs, the jury were satisfied that the plaintiffs were authorized by Stevens to hold themselves out as his agents at the station, for the transportation of passengers thence to the Revere House, and the defendants knowing this, by means of false representations that they were the agents of Stevens for this purpose, or that the plaintiffs were not, induced persons to go by the coaches of the defendants, instead of going by the coaches of the plaintiffs, and that thereby passengers were actually diverted from the plaintiffs' coaches, then the plaintiffs might recover of the defendants such damages as the plaintiffs had shown they had sustained in consequence of such false representations, and the loss of passengers thereby occasioned.

The jury returned a verdict for the plaintiffs, assessing damages in the sum of seventy-five cents, and the plaintiffs excepted to the instructions of the judge.

FLETCHER, J. This is an action on the case, sounding in tort. The principle involved in the merits of the case is one of much importance, not only to persons situated as the plaintiffs are, but also to the public. But this principle is by no means novel in its character, or in its application to a case like the present. It is substantially the same principle which has been repeatedly recognized and acted on by courts, in reference to the fraudulent use of trade-marks, and regarded as one of much importance in a mercantile community. Vast numbers, no doubt, of the strangers who are continually arriving at the stations of the various railroads in the city have a knowledge of the reputation and character of the principal hotels, and would at once trust themselves and their luggage to coachmen supposed to have the patronage and confidence of these establishments. Not only much wrong might be done to individuals situated like the plaintiffs, but great fraud and imposition might be practised upon strangers, if coachmen were permitted to hold themselves out falsely as being in the employment, or as having the patronage and countenance, of the keepers of well-known and respectable public-houses.

It was said, in behalf of the defendants, that the lessee of the Revere House had no exclusive right to convey passengers from the Worcester Railroad to his house, nor had he the exclusive right to put upon his coaches or the badges of his servants the words "Revere House," and could confer no such exclusive right on the plaintiffs: that the defendants, in common with all other citizens, have a right to convey passengers from the Worcester Railroad to any public-house, and have a right to indicate their intention so to do, by marks on their coaches and on the badges of their servants.

This may all be very true, but it does not reach the merits of the case. The plaintiffs do not claim the exclusive right of using the

words "Revere House;" but they do claim the exclusive right to use those words in a manner to indicate, and for the purpose of indicating, the fact that they have the patronage and countenance of the lessee of that house, for the purpose of transporting passengers to and from that house, to and from the railroads. The plaintiffs may well claim that they had the exclusive right to use the words "Revere House," to indicate the fact that they had the patronage of that establishment; because the evidence shows that such was the fact, and that the plaintiffs, and they alone, had such patronage of that house, by a fair and express agreement with the lessee. For this privilege they paid an equivalent in the obligations into which they entered. The defendants, no doubt, had a perfect right to carry passengers from the station to the Revere House. And they might perhaps use the words "Revere House," provided they did not use them under such circumstances and in such a manner as to effect a fraud upon others.

The defendants have a perfect right to carry on as active and as energetic a competition as they please, in the conveyance of passengers to the Revere House or any other house. The employment is open to them as fully and freely as to the plaintiffs. They may obtain the public patronage by the excellence of their carriages, the civility and attention of their drivers, or by their carefulness and fidelity, or any other lawful means. But they may not by falsehood and fraud violate the rights of others. The business is fully open to them, but they must not dress themselves in colors, and adopt and wear symbols which belong to others.

The ground of action against the defendants is not that they carried passengers to the Revere House, or that they had the words "Revere House" on the coaches and on the caps of the drivers, merely; but that they falsely and fraudulently held themselves out as being in the employment, or as having the patronage and confidence, of the lessee of the Revere House, in violation of the rights of the plaintiffs. The jury would have been well warranted by the evidence in finding that the defendants used the words "Revere House," not for the purpose of indicating merely that they carried passengers to that house, but for the purpose of indicating, and in a manner and under circumstances calculated and designed to indicate, that they had, and to hold themselves out as having, the patronage of that establishment. Upon the evidence in the case, the jury should have been instructed, that if they were satisfied by the evidence that the plaintiffs had made the agreement with the lessee of the Revere House, as stated, they had, under and by virtue of that agreement, an exclusive right to use the words "Revere House," for the purpose of indicating and holding themselves out as having the patronage of that establishment for the conveyance of passengers; and that if the defendants used those words, in the manner and under the circumstances stated in the evidence, for the purpose of falsely holding themselves out as having

the patronage and confidence of that house, and in that way to induce passengers to go in the defendants' coaches, rather than in those of the plaintiffs, that would be a fraud on the plaintiffs, and a violation of their rights, for which this action would lie, without proof of actual or specific damage; that if the jury found for the plaintiffs, they would be entitled to such damages as the jury, upon the whole evidence, should be satisfied they had sustained; that the damage would not be confined to the loss of such passengers as the plaintiffs could prove had actually been diverted from their coaches to those of the defendants; but that the jury would be justified in making such inferences, as to the loss of passengers and injury sustained by the plaintiffs, as they might think were warranted by the whole evidence in the case.

Though the instructions, as given, may have been intended to conform substantially to these views, yet, upon the whole, it seems to the court that the principles of the law, upon which the rights of the parties were to be determined, were not stated with all that distinctness and accuracy which the practical importance of the case requires.

The principles of law which govern this decision are so fully settled by numerous decisions, that it seems unnecessary to go into any particular examination of authorities, but it is sufficient merely to refer to some leading cases. *Coats v. Holbrook*, 2 Sandf. Ch. 586; *Blofeld v. Payne*, 4 B. & Ad. 410; *Morison v. Salmon*, 2 Man. & Gr. 385; *Knott v. Morgan*, 2 Keen, 213; *Croft v. Day*, 7 Beavan, 84; *Rodgers v. Nowill*, 5 Man., G. & S. 109; *Bell v. Locke*, 8 Paige, 75; *Stone v. Carlan*, 13 Law Reporter, 360.

New trial ordered.

FULLER v. HUFF.

Circuit Court of Appeals of the United States, July, 1900. 104 Fed. 141.

THE case is stated in the opinion.

SHIPMAN, Circuit Judge. The complainant, Frank Fuller, a citizen of New Jersey, commenced in the year 1875, under the name of "Health Food Company," to sell in the city of New York cereal products prepared for food, and has continued to the present time in that business and in the use of the same name, under which he has extensively advertised his goods by circulars, and in newspapers and magazines, at a cost of from \$75,000 to \$100,000. He has established agencies in Brooklyn, Chicago, Boston, Washington, Philadelphia, St. Louis, and Oakland. The name "Health Food Company" is displayed prominently upon the packages in which the various arti-

cles are presented to the consumers. About 50 different articles have been thus placed upon the market. The business has become large, and the name is unquestionably valuable to the complainant. In October, 1876, John H. Kellogg took charge, and has continued to be in charge, of the institution popularly known as the "Battle Creek Sanitarium," but incorporated in pursuance of the laws of the state of Michigan, in 1876, under the name of the "Health Reform Institute." This corporation is the owner of a large sanitarium, having branch institutions at various places, and has established in this country and elsewhere suborganizations for the promotion of charitable and missionary work. The Battle Creek Sanitarium recommended to its patients particular kinds of cereal foods, and entered upon the business of manufacturing and selling these articles under the name of "Sanitarium Foods." In 1881, 19 different articles were made. In 1888 the business of food manufacture was made a separate department, under the name of "Sanitarium Food Company," which advertised itself in April, 1893, as "Sanitarium Health Food Company." The reason for this, and a subsequent change of name, which preserved the words "Health Food Company," is stated by Kellogg in his deposition as follows:

"In April, 1893, our advertisement appears in Good Health, over the business name of 'Sanitarium Health Food Company.' This name we were led to adopt by the action of one of our old employees, who, leaving the institution, set up in business in the same town, advertising himself under the name of the 'Battle Creek Health Food Company.' As quite a large proportion of our mail had for years been addressed to us as the 'Battle Creek Health Food Company,' we found this action a serious annoyance, and objected to it, with the result that an arbitration was agreed upon, the result of which was that the party referred to was required to change his name, which he did, adopting the title the 'Battle Creek Bakery Company.' We then added the word 'Health' to our business announcement, making it 'Sanitarium Health Food Company.' Our salesmen, however, in introducing our foods, so constantly made use of the term 'Battle Creek Sanitarium' in describing our foods, to distinguish between our institution and numerous other sanitariums, we finally, some two or more years ago, still further extended the business title of our food department to its present form, — the 'Battle Creek Sanitarium Health Food Company.' Our purpose in adopting the words 'Health Food' in our name was to protect ourselves against parties who sought to pirate the extensive business which we had built up, by assuming a name similar to ours, and making similar goods in the same town."

Their packages and cartons have the name "Health Food Co." in conspicuous type, prefixed by the word "Sanitarium," and in smaller type the words "Battle Creek, Michigan," under the name. The

packages do not imitate or resemble in external appearance the dress of the packages of the complainant.

In October, 1896, a retail grocers' food exhibition was held at the Grand Central Palace in New York City. The complainant exhibited his products at a booth, under the prominently displayed name, "Health Food Company." About 15 or 20 feet distant the defendant Barton Huff, a citizen of the state of New York, as agent of the Health Reform Institute, exhibited its wares, and upon its booth was a placard containing the words "Health Food Company," in large letters, under the words "Battle Creek Sanitarium." The complainant remonstrated with Huff against the use of "Health Food Company" as an infringement of the complainant's right, and threatened a suit. Huff said that he would bring the representation to the attention of the officers of the Health Food Department, but the use of the name did not cease. The food business of the defendant under its last name is extensively advertised, and, when the testimony was being taken, was said to amount to from \$260,000 to \$300,000 annually. The circuit court dismissed the bill upon the ground that the defendant's name was clearly distinguishable from the complainant's business name, and was not an unlawful appropriation. 99 Fed. 439.

The term "Health Food" means healthy food, or health-producing food, and is therefore descriptive of quality, and cannot be a technical trade-mark, either with or without the word "Company," any more than the words "Nutritious Wine" could be a valid trade-mark. If a case against the defendant exists, it is one of unfair competition; and the law upon the subject of the adoption by a competitor of names or words descriptive of quality, which have previously become trade-names, and which adoption will constitute unfair competition, is correctly stated by the counsel for the defendant as follows:

"When such a mark, name, or phrase has been so used by a person in connection with his business or articles of merchandise as to become identified therewith, and indicate to the public that such articles emanate from him, the law will prohibit others from so using it as to lead purchasers to believe that the articles they sell are his, or as to obtain the benefit of the market he has built up thereunder."

The same statement of the law is contained in the case of *Reddaway v. Banham*, App. Cas. 199, decided by the House of Lords in 1896, in which it was held that "one person was not entitled to pass off his goods as those of another by selling them under a name likely to deceive purchasers, whether immediate or ultimate, into the belief that they were buying the goods of the former, although the name was, in its primary sense, merely a true description of the goods." The subject of the unlawful use of competitors of the name under which a rival has previously presented himself to the public and has gained a business reputation, although the name is not strictly a

trade-mark, and is either geographical or descriptive of quality, has been frequently of late before the courts, which have demanded a high order of commercial integrity, and have frowned upon all filching attempts to obtain the reputation of another. *Lee v. Haley*, 5 Ch. App. 155; *North Cheshire & M. Brewery Co. v. Manchester Brewery Co.*, 1899, App. Cas. 83; *City of Carlsbad v. Kutnow*, 18 C. C. A. 24, 71 Fed. 167; *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85; ¹ *Block v. Distributing Co.* (C. C.) 95 Fed. 978.

The question, therefore, is, is the real defendant's use (for it is manifest that the Michigan corporation is the real defendant) of the words "Health Food Company," in connection with the words used as a prefix and suffix, such a use as is likely to deceive consumers into the belief that they were buying the complainant's goods. It is to be observed that the frequent insignia of an intent to deceive, viz. the copy or the imitation, more or less close, of the dress of the competitor's packages, are absent in this case; but if a trade-name has been so identified with the business of a manufacturer as to inform the public that the name upon goods means that they are the product of that person, and another subsequently adopts and displays the name, it is not material that he has not also adopted the particular dress in which his predecessor has presented his goods. *Hier v. Abrahams*, 82 N. Y. 519. The complainant had used the name for 18 years before the defendant assumed it, had acquired an extensive business under it, and had established agencies for his goods in six or seven Eastern and Western cities, while all that the consumer knew of the complainant's goods was that they were presented to him as the products of the Health Food Company. The defendant announced its goods in 1881 as "Sanitarium Foods," advertised them also as "Invalid Foods," and waited until 1893 before they were presented as the products of the Sanitarium Health Food Company. The reason for the adoption of this name was a desire to forestall its use by any one else, thus recognizing the benefit from the name and the advantage from priority in its use. Three years after, it knew that it had long been prominently used by, and was the sole business name of, the complainant. The defendant now so coveted the name as to determine not to relinquish it, and continued its use despite remonstrance. The benefit to the corporation was derived from the familiarity with the name on the part of that portion of the public which used this class of goods. It is said, however (and the circuit court yielded to the defence) that the name is presented to the public with such accompanying assertions in regard to the manufacturer of the goods and the place of the manufacture that the consumer need not be deceived. In the class of cases in which a manufacturer is using his own name, or the name of another person which has become

¹ *Ante*, p. 97.

generic, this defence is of great value, because it is the duty of the user to make any inevitable harm as light as possible. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169. The question in this case is, however, whether the simple use of the name, although with prefixes or suffixes, is not "likely to deceive purchasers." The history is significant in regard both to the motive of the Michigan corporation in retaining its occupancy of the name and the probable effect of a permanent retention. After it had presented its goods to the public for years under the name "Sanitarium Foods" and "Invalid Foods," there was no necessity for an abandonment of the former names, under which it had confessedly obtained success, and by which it was well and favorably known by its customers. The adherence to the new name to the extent of guaranteeing productions to its purchasers against suits indicates the pecuniary benefit which was expected to ensue from the adoption of a name to which consumers had long been accustomed, and the persistence in the use also indicates the pecuniary injury which was liable to come upon the complainant. The case is not one where the Michigan corporation must use to a certain extent the name of the complainant, and it is not, therefore, one of *damnum absque injuria*. It is the case of an unnecessary use of a name long previously used by another in the same business, and in the recent decisions, by courts of last resort, upon the right to the use of trade-names, although geographical or descriptive in their primary meaning, great importance is given to mere long-continued and exclusive priority of use. *North Cheshire & M. Brewery Co. v. Manchester Brewery Co.*, supra; *American Waltham Watch Co. v. United States Watch Co.*, supra. It was not necessary for the complainant to attempt to discover whether a purchaser had been actually deceived, for a manifest liability to deception exists. *Taendsticksfabriks Aktiebolaget Vulcan v. Myers*, 139 N. Y. 364; *Manufacturing Co. v. Trainer*, 101 U. S. 51; *Biscuit Co. v. Baker* (C. C.) 95 Fed. 135. Although the intent of the defendant's principal when it commenced to use the name "Health Food" may have been innocent, the continuance, after it had learned of the complainant's prior use, indicates its deliberate intention to use the name without reference to the complainant's possible prior rights. *Orr v. Johnston*, 13 Ch. Div. 434. The decree of the circuit court is reversed, with costs, and the cause is remanded to that court with instructions to enter a decree for injunction against the defendant Barton Huff in accordance with the prayer of the bill, with costs.

CULPABLE ACCIDENT

CHAPTER III.

NEGLIGENCE.

EMRY *v.* ROANOKE, ETC., CO.

Supreme Court of North Carolina, September, 1892. 111 No. Ca. 94.

ACTION for negligence. The facts are stated in the opinion.

SHEPHERD, J. The argument before us was based upon the assumption that the defendant, in conducting certain blasting operations on its own land, was guilty of negligence by reason of its failure to exercise ordinary care, and that its liability for the same can only be avoided by establishing contributory negligence on the part of the plaintiffs.

In our opinion, the true principle upon which the case is to be determined lies quite beyond that discussed by counsel, and involves a consideration of the question, not whether there was contributory negligence, but whether the defendant was guilty of any negligence whatever, for which, under the circumstances, it is liable to the plaintiffs.

While there may be some shades of difference in the various definitions of negligence, all the authorities agree that its essential element consists in a breach of duty, and that in order to sustain an action, "the plaintiff must state and prove facts sufficient to show what the duty is and that the defendant owes it to him." 1 Shear. & Red. Neg., § 8; Beach, Cont. Neg., 6; Thompson, Neg., preface.

A legal duty has been well defined by Dr. Wharton, as "That which the law requires to be done, or forborne to a determinate person or to the public at large, and is a correlative to a right vested in such determinate person or in the public." Whar. Neg., § 24. "The duty itself arises out of various relationships of life, and varies in obligation under different circumstances. In one case the duty is high and imperative; in another, it is of imperfect obligation. Thus it may be dependent on a mere license to enter upon land, or the bare obligation, to avoid inflicting a wilful injury upon a trespasser, while, upon the other hand, it may be a duty to care for the safety of a specially invited guest, or of a passenger for hire." 16 Am. & Eng. Enc., 412, and the numerous cases cited.

This much being premised, we must now ascertain what duty, if

any, was imposed by law upon the defendant in the present action, and this involves an inquiry into the relation of the parties in respect to the buildings, for the accidental destruction of which the action is brought.

It is conceded that the defendant was the owner of the land upon which the buildings were located, and it appears that, in January, 1887, a suit between the present parties was settled according to the terms of the following agreement, to wit: "That the said T. L. Emry and wife do further agree that if they cannot agree with said company upon rent for the use of the water and land of the company, upon which the mills and foundry of said Emry and wife, described in the complaint, are situated, then, upon six months notice from the said company, they will remove their mills, foundry and machinery from the lands of said company. This 14th day of January, 1887."

We cannot concur in the contention of the plaintiffs that, under this agreement, they were entitled to keep their buildings upon the premises, without the payment of rent, until the defendant had improved the canal so as to increase the supply of water. The agreement contains no such provision, and we feel that we would be doing violence to the ordinary rules of interpretation by so extending its terms beyond the meaning of the plain and unambiguous language employed. The argument can derive no support from extrinsic circumstances, as it appears that the plaintiffs had been using the water of the canal to some extent by keeping it cleaned out, and that shortly after making the agreement, they proposed to continue the use of the same. There was, therefore, an existing subject upon which the agreement could presently operate, and it is with reference to this, as well as to any contemplated improvement, that it must be construed. If the actual contract was such as is contended, it is to be regretted that it was not incorporated into the written agreement, as it seems that the conduct of the agent of the plaintiffs was influenced by a reasonable misapprehension of the legal effect of the said instrument.

It is further insisted by the terms of the agreement that it was the duty of defendant to entertain in good faith a proposition to fix the rental value of the water and land therein mentioned; and that if it refused to do so, it had no right to require the removal of the buildings, etc. Granting this to be a correct interpretation of the agreement, we are unable to find anything in the testimony which discloses that the defendant arbitrarily or in bad faith declined to consider any such proposition of the plaintiffs. On the contrary, the plaintiffs' agent (who seems to have had full control and management of the whole matter) explicitly testified that before the notice to remove was served on him, the defendant's attorney demanded that the plaintiffs enter into a new contract of rent, and that failing to do so they should remove the buildings. The said agent further testified that in

response to the proposition he replied as follows: "I stated that I would go on as I had been, and keep the canal cleaned out for the use of the land and water, but I could not pay rent, as the canal was in bad repair and supplied scarcely any water." The witness also stated that the defendant's attorney declined to accept his proposal, and that they had no further negotiations.

Here then was a distinct offer to "enter into a new contract for rent," and this offer was declined, except upon the terms demanded by the plaintiffs. We fail to perceive how the refusal to accept these terms can be considered as evidence that the defendant was unwilling to make a bona fide effort to agree upon a reasonable rental value. If, under the contract, it was the duty of the defendant to make a fair effort to agree, it was surely released from that obligation after the plaintiffs, without hearing any proposal from the defendant, had expressly refused to accede to any other but the previously existing terms. There having been a failure to agree as to the rent, the defendant had a right to insist upon the removal of the buildings upon six months notice, as provided in the agreement, and it was not bound to entertain any further propositions on the part of the plaintiffs. Accordingly, a notice to remove the buildings was given, pursuant to the agreement, on the 3d of February, 1887; but notwithstanding this notice the plaintiffs failed to remove the same, and kept them on the defendant's land after they knew that the defendant had commenced its blasting operations, and until they were accidentally destroyed by fire in September, 1890. As early as the 6th of June of that year the defendant complained of the plaintiffs' failure to comply with the notice, and at the same time stated that as the land occupied by the buildings was absolutely necessary for its use, it would proceed to remove them unless the plaintiffs did so in eleven days. At the expiration of that time the defendant attempted to remove the buildings, but was prevented by the plaintiffs from doing so by means of a shot-gun. Without pausing to consider whether the long and unreasonable delay to remove the buildings did not have the effect of vesting the same in the defendant as a part of its free-hold (a point which was waived by the answer), it cannot be questioned, that in their failure to remove them after said notice, and especially in the violent prevention of the defendant from exercising its right of removal, the plaintiffs were trespassers upon the lands of the defendant. *Taylor, Landlord and Tenant*, §§ 62 and 63. This status of the plaintiffs is in no way affected by the conversation between their agent and the secretary of the defendant in 1890. Giving full effect to the testimony of the former, it amounted to no more than a parol license to continue the lower mill on the defendant's land in view of the establishment of an oil mill at some indefinite time in the future, which was in fact never done. The license was revocable at the election of the defendant. *Kivett v. McKeithan*, 90 N. C. 106;

McCracken v. McCracken, 88 N. C. 272; *Railroad v. Railroad*, 104 N. C. 658, and was actually revoked on the 6th of June, 1890, by the notice given on that day. The plaintiffs had until the 24th of September of that year (the date of the accident) to remove the buildings, and not only failed to remove them, but, as we have seen, forcibly prevented the defendant from doing so. It cannot be seriously insisted that the effect of this conversation was to revive the broken agreement of 1887, so as to entitle the plaintiffs to another six months notice of removal. Much clearer testimony than this is necessary to work a result so restrictive of the rights of a property owner. Besides, the alleged agreement was essentially different from the old one, as it related to and was conditioned upon the establishment of a new industry, and the supply of water was to be furnished "at the same rates as to others." The old agreement, as we have construed it, had reference to the existing state of affairs, and contemplated the present payment of rent of some character.

The plaintiffs then being trespassers upon the land of the defendant, we will now proceed to inquire into the nature of the duty which the latter owed to the former in respect to the said buildings.

It is a well settled principle that a land-owner has a right to the exclusive use and enjoyment of his premises, and that he incurs no liability for injuries caused by its unsafe condition to a person who was not at or near the place of the accident by lawful right, and when the owner has neither expressly nor by implication invited him there. *Sweeny v. Railroad*, 10 Allen, 368; *Bennett v. Railroad*, 102 U. S. 577; *Carlton v. Steel Co.*, 99 Mass. 216; *Cooley on Torts*, 605 and 606; *Pierce v. Whitcomb*, 46 Vt. 127; *Pittsburg v. Railroad*, 29 Ohio St. 367; 1 *Thompson on Neg.*, 283 and 303.

The doctrine is thus stated in *Schmidt v. Bauer*, 5 La. An. Repts. 580, and notes: "Unless contrivances are placed on such premises with an actual or constructive intent to hurt intruders, the proprietor is not liable for injury resulting to persons by reason of the condition in which the premises have been left, or from the prosecution of a business in which the owner had a right to engage. *Evansville, etc., v. Griffin*, 100 Ind. 21; *Gillespie v. McGowan*, 11 Pa. 144; *Gramlich v. Wurst*, 86 Pa. 74; *Cauley v. Pittsburg, etc.*, 90 Pa. 398; *McAlpine v. Powell*, 70 N. Y. 126; *Hargreaves v. Deacon*, 25 Mich. 1; *Burdick v. Cheadle*, 26 Ohio, 393; *Indianapolis v. Emmelmon*, 6 West Rept. 569."

The foregoing authorities, and many others that could be cited, abundantly sustain the proposition "that a trespasser or mere licensee who is injured by a dangerous machine or contrivance on the land or premises of another, cannot recover damages unless the contrivance is such that the owner may not lawfully erect or use, or when the injury is inflicted wilfully, wantonly or through the gross negligence¹

¹ Quære.

of the owner or occupier of the premises." *Galveston Oil Co. v. Martin*, 70 Texas, 400.

In the leading case of *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, it was held that where one goes upon the premises of another, without invitation, to obtain employment, and is there injured by a defective machine, he cannot recover. Andrews, J., in the course of a well reasoned opinion, uses the following language: "The precise question is whether the person, who goes upon the land of another without invitation to secure employment from the owner of the land, is entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises, not obviously dangerous, which he passes in the course of his journey, if he can show that the owner might have ascertained by the exercise of reasonable care. We know of no case which goes to that extent." After speaking of the liability of a land-owner to an uninvited person for injuries caused by the setting of spring-guns or dangerous traps on his premises, and also the duty of railroad companies in running their trains to use proper care in respect to persons on the track, where it has been used by the public without objection, the learned Judge continues: "But in the case before us, there were no circumstances creating a duty on the part of the defendant to the plaintiff to keep the whimsey in repair, and consequently no obligation to remunerate the latter for his injury." It has also been held, where a sign of "No admittance" was placed on a door, that one who entered the room (being of the class meant to be excluded) cannot recover for injuries caused by the negligence in the management of the room, even though no attempt was made to exclude him, nor any further warning given. *Zoebisch v. Tarbell*, 10 Allen, 385; *Victory v. Baker*, 67 N. Y. 366. So where a trespasser entered the defendant's abandoned freight-house and the wind blew the wall down and injured him. *Larry v. Railroad Co.*, 78 Ind. 323. To the same effect is the case of *McDonald v. Railroad*, 35 Fed. Rep. 38. There, the defendant corporation in working its coal mine threw out a pile of slack on its own land, the pile presenting the appearance of coal ashes. The land was not fenced, and a stranger in the neighborhood in passing over the slack was burned. It was held that he had no right of action against the corporation.

In *Batchelor v. Fortescue*, 47 J. P. 308 (Eng.), the defendant had contracted to do certain work on a plat of ground where buildings were erected and excavations were being made. To carry out the work, he, by his men, worked a steam-winch and crane, with a chain and iron tub attached thereto. The deceased was employed by the owner of the ground to watch the materials and buildings. He had no duty to take part in the excavating, and it was no part of his business to stand under the tub as it was raised. While watching the men working, the tub fell on his head and he was killed. It was held that

the defendant was not liable. "The deceased was there to watch the material and buildings. He had no business with the machinery, nor any duty to watch the defendant's men at work. He was thus in a place where he had no right to be and was a mere licensee to whom the defendant owed no duty."

It is true that the general principles we have enunciated are subject to some qualifications, under possible circumstances, in favor of certain licensees, or purely technical trespassers, and of persons walking on a railroad track, as in *Clark v. Railroad*, 109 N. C. 430, and *Deans v. Railroad*, 107 N. C. 686. Here, on the border-land between the doctrine we have stated, and that of contributory negligence, there is some obscurity and conflict in the authorities. But however that may be, there is no difficulty in its application to a case like the present, where, in the eyes of the law, the plaintiffs must be regarded as wilful trespassers. The authorities are practically unanimous in holding that, in favor of trespassers of this character, the land-owner owes no duty to exercise ordinary care in the use of his premises or in the conduct of lawful operations thereon. If no such duty existed in the foregoing cases, which have been cited by way of illustration, and in which the lives of human beings were imperiled, it would be difficult, indeed, to understand how it could be imposed upon the defendant in this action. It would be a strange result if one who is involuntarily made the custodian of another's property by the coercive power of a shot-gun, should be held liable for an accident to such property because of his failure to take all of the precautions which would commend themselves to a prudent man. It is fully settled by the authorities above mentioned that the duty of a land-owner, under such circumstances, can be no greater than to abstain from what is very generally called "wanton or wilful negligence." The defendant had a right to improve its property, and, in blasting for that purpose, it was engaged in a lawful occupation. There is nothing to show that its servants acted wilfully, wantonly or recklessly, and there is no testimony tending to prove that after they discovered the accident, they could, by ordinary care, have prevented the destruction of the building. Certainly there is nothing to indicate the same indifference on their part as that shown by the plaintiffs' agent, who, although he had his hands present, made no effort to arrest the flames, and, indeed, stated that, as he did not cause the fire, he would not assist in putting it out and "that it might burn." The defendant, therefore, having been guilty of no "wilful or wanton negligence" (the abstaining from which constituted its only duty under the circumstances), it must follow that it cannot be held liable for the accidental destruction of the plaintiffs' property.

We have carefully considered the other exceptions, and are of the opinion that they are without merit. The judgment must be

Affirmed.

HANKINS v. WATKINS.

Supreme Court of New York, April, 1894. 77 Hun. 361.

THE case is stated in the opinion.

There was a trial by jury and verdict for the plaintiff; defendant's motion for a new trial was denied and the defendant appealed.

MARTIN, J. This action was for negligence. The plaintiff claimed, and the evidence given in his behalf disclosed, that on the 14th day of October, 1889, he and his brother went to the head of Cayuga Lake, duck hunting; that they took with them two tame ducks to be used as decoys; that while they were preparing to anchor them as such decoys one of them escaped from the boat in which they were, and the plaintiff and his brother pursued it; that while doing so the defendant shot at them and seriously injured the plaintiff; that the accident occurred a few minutes before six o'clock in the morning; that it was clear and broad daylight, being about fifteen or twenty minutes before sunrise; that between the place where the defendant stood when he fired and the boat in which the plaintiff and his brother were, there was nothing to obstruct the defendant's vision, so that if he had looked before firing he would have seen the plaintiff, his brother and the boat in which they were at the time. The evidence of the defendant was somewhat in conflict with that of the plaintiff, and tended to show that it was not sufficiently light at the time to enable him to see the plaintiff, and that his vision was obstructed by the limbs of the trees and shrubs that stood between him and the plaintiff.

The question whether the transaction was as claimed by the plaintiff, or as claimed by the defendant, was submitted to the jury and it found in favor of the plaintiff. Therefore, in examining the questions of the defendant's negligence and the plaintiff's freedom from contributory negligence, we must regard the facts proved by the plaintiff as the established facts in this case. Assuming the transaction to have occurred in the manner testified to by the plaintiff and his witnesses, it is quite obvious that both the question of the defendant's negligence and the question of the plaintiff's freedom from contributory negligence were questions of fact that were properly submitted to the jury, and that its findings thereon should be regarded as final.

The appellant, however, insists that the rule of law applicable to this case is, that "One who is hunting in a 'wilderness' is not bound to anticipate the presence, within range of his shot, of another man, and is not liable for an injury caused unintentionally by him to a person of whose presence he was not aware," and cites 4 Wait's Actions and Defenses, 702, and *Bizzell v. Booker*, 16 Ark. 308, to uphold his insistence. When we examine the *Bizzell* case we not

only find that the facts in that case were wholly unlike those in the case at bar, but that all that was held in that case was, that where a person doing a lawful act, or an act not mischievous, rash, reckless or foolish, and naturally liable to result in injury to others, he was not responsible for damages resulting therefrom by accident or casualty, while he was in the exercise of such care and caution to avoid injury to others as a prudent man would observe under the circumstances surrounding him. We also find that in that case it was expressly held that such a person would be answerable for damages which resulted from his negligence or want of such care and caution on his part. Referring to Wait's Actions and Defenses, we find the statement above quoted, and that the Bizzell case is the only authority cited to sustain it. We fail to see how the doctrine of the Bizzell case in any way aids the defendant, but, on the contrary, it seems to be an authority in favor of the plaintiff, as the court in that case expressly indorsed the doctrine laid down by Bronson, Ch. J., in *Vandenburgh v. Truax*, 4 Den. 464, as follows: "It may be laid down as a general rule, that when one does an illegal, or mischievous act which is likely to prove injurious to others, and that injury to third persons may probably ensue, he is answerable in some form of action for all the consequences which may directly and naturally result from his conduct. . . . It is not necessary that he should intend to do the particular injury which follows, nor, indeed, any injury at all." In *Shearman & Redfield on Negligence* (§ 686) it is said: "A very high degree of care is required from all persons using firearms in the immediate vicinity of other people, no matter how lawful or even necessary such use may be," and the cases of *Weaver v. Ward*, Hob. 134; *Castle v. Duryee*, 1 Abb. Ct. App. Dec. 327; *Moody v. Ward*, 13 Mass. 299; *McClenaghan v. Brock*, 5 Rich. Law (So. Car.), 17; *Haack v. Fearling*, 5 Rob. 528; *Moebus v. Becker*, 46 N. J. Law, 41, are cited to sustain that proposition. Cooley, in his work on Torts, p. 705, says: "When one makes use of loaded weapons he is responsible only as he might be for any negligent handling of dangerous machinery, that is to say, for a care proportioned to the danger of injury from it." Under the circumstances disclosed by the evidence in this case, and upon the authorities bearing upon the question of the defendant's liability, we think there is no doubt of the plaintiff's right to recover in this action.

On the trial the defendant was asked: "Did you intend to shoot this plaintiff?" This question was objected to by the plaintiff, the objection was sustained and the defendant duly excepted. While it has been held that when the question of the party's intent is one of the issues in an action, he may testify that he had or did not have the intent charged, still, where the issue is not one of intent, such evidence is inadmissible, as his intent is wholly immaterial. In this case, while the complaint charges the defendant with having wrong-

fully and negligently caused the plaintiff's injury, there was no claim on the trial that his act was intentional, but, on the contrary, the plaintiff sought to recover only upon the ground of the defendant's negligence. This is shown very plainly by that portion of the charge of the learned trial judge, in which he said to the jury: "It is not claimed that he (defendant) wilfully shot the plaintiff. The plaintiff's counsel repudiates the idea that he deliberately and wilfully, intending to hit these men, shot at them, for they claim that the act was a lawless act, and that the act was careless and negligent, and not deliberate or wilful." Again, the judge says: "But this is not a charge of wilful shooting." Thus the question at issue between the parties on the trial was whether the plaintiff's injury was caused by the defendant's negligence, and no question of his intent was involved in the case. We find no error in this ruling.

The defendant was also asked: "Did you handle your gun that morning in a careful, prudent and cautious manner?" This was objected to, the objection sustained and the defendant excepted. We think this exception was not well taken. If by this question the defendant sought to show that in his opinion he was not negligent in shooting the plaintiff, it was inadmissible, as that was a question not for the witness, but for the jury to decide. *Carpenter v. Eastern Transportation Co.*, 71 N. Y. 574; 16 Am. & Eng. Ency. of Law, 463, and cases cited. If the defendant's purpose was to show that he handled his gun with care, it was immaterial, as the negligence charged did not relate to the manner in which he used his gun, but consisted in his shooting towards the plaintiff without previously looking to see what was within the range of his gun when he fired. The defendant was also asked: "Have you had considerable experience in handling a gun, and were you careful in handling your gun upon the morning in question?" which was objected to and excluded. This was in substance the same as the previous question, and the evidence was properly rejected. We are also of the opinion that the court properly refused to admit the evidence called for by the question put to the witness Brown, whether the defendant was "a capable and careful hand to handle a gun."

It appears that photographs had been taken of the place where this injury occurred. The plaintiff was interrogated as to the relative condition, at the time when they were taken, and when the injury occurred, of the trees, water and other things, as to what was done, and as to whether there was anything to obstruct the defendant's view. This evidence was objected to by the defendant, and admitted under his exception. As the photographs were not admitted in evidence or shown to the jury, we are unable to see how the defendant could possibly have been injured by the admission of this evidence. It is quite manifest that even if the evidence was inadmissible its admission was harmless, and, hence, we find in the ruling no reason to disturb the judgment.

Having considered all the questions presented by the defendant in his brief, and having found no exception that would justify us in interfering with the judgment, it follows that the judgment and order should be affirmed.

HARDIN, P. J., and MERWIN, J., concurred.

*Judgment and order affirmed, with costs.*¹

MILWAUKEE, ETC., R. R. Co. v. ARMS.

Supreme Court of the United States, October, 1875. 91 U. S. 489.

ERROR to the Circuit Court of the United States for the District of Iowa.

This action against the railroad company to recover damages for injuries received by Mrs. Arms, by reason of a collision of a train of cars with another train, resulted in a verdict and judgment for \$4,000. The company sued out this writ of error.

The bill of exceptions discloses this state of facts: Mrs. Arms, in October, 1870, was a passenger on defendant's train of cars, which, while running at a speed of fourteen or fifteen miles an hour, collided with another train moving in an opposite direction on the same track. The jar occasioned by the collision was light, and more of a push than a shock. The fronts of the two engines were demolished, and a new engine removed the train. This was all the testimony offered by either party as to the character of the collision, and the cause of it; but there was evidence tending to show that Mrs. Arms was thrown from her seat, and sustained the injuries of which she complained. After the evidence had been submitted to the jury, the court gave them the following instruction: "If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiffs punitive or exemplary damages."

MR. JUSTICE DAVIS. The court doubtless assumed, in its instructions to the jury, that the mere collision of two railroad trains is, ipso facto, evidence of gross negligence on the part of the employees of the company, justifying the assessment of exemplary damages; for a collision could not well occur under less aggravated circumstances, or cause slighter injury. Neither train was thrown from the track, and the effect of the collision was only to demolish the fronts of the two locomotives. It did not even produce the "shock" which usually results from a serious collision. The train on which Mrs. Arms was riding was moving at a very moderate rate of speed; and the other train must have been nearly, if not quite, stationary. There was

¹ See Bigelow on Torts, 8th edition, pp. 108, 109.

nothing, therefore, save the fact that a collision happened, upon which to charge negligence upon the company. This was enough to entitle Mrs. Arms to full compensatory damages;¹ but the inquiry is, whether the jury had a right to go further, and give exemplary damages.

It is undoubtedly true that the allowance of anything more than an adequate pecuniary indemnity for a wrong suffered is a great departure from the principle on which damages in civil suits are awarded. But although, as a *general rule*, the plaintiff recovers merely such indemnity, yet the doctrine is too well settled now to be shaken, that exemplary damages may in certain cases be assessed. As the question of intention is always material in an action of tort, and as the circumstances which characterize the transaction are, therefore, proper to be weighed by the jury in fixing the compensation of the injured party, it may well be considered whether the doctrine of exemplary damages cannot be reconciled with the idea, that compensation alone is the true measure of redress.

But jurists have chosen to place this doctrine on the ground, not that the sufferer is to be recompensed, but that the offender is to be punished; and, although some text-writers and courts have questioned its soundness, it has been accepted as the general rule in England and in most of the States of this country. 1 Redf. on Railw. 576; Sedg. on Measure of Dam., 4th ed., ch. 18 and note, where the cases are collected and reviewed. It has also received the sanction of this court. Discussed and recognized in *Day v. Woodworth*, 13 How. 371, it was more accurately stated in *The Philadelphia, Wilmington, & Baltimore R. R. Company v. Quigley*, 21 How. 213. One of the errors assigned was that the Circuit Court did not place any limit on the power of the jury to give exemplary damages, if in their opinion they were called for. Mr. Justice Campbell, who delivered the opinion of the court, said, —

“In *Day v. Woodworth* this court recognized the power of the jury in certain actions of tort to assess against the tort-feasor punitive or exemplary damages. Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act: the word implies that the wrong complained of was conceived in the spirit of mischief, or criminal indifference to civil obligations.”

As nothing of this kind, under the evidence, could be imputed to the defendants, the judgment was reversed.

Although this rule was announced in an action for libel, it is equally applicable to suits for personal injuries received through the negligence of others. Redress commensurate to such injuries should

¹ See *Benedick v. Potts*, post, p. 133.

be afforded. In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go further, unless it was done wilfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. In that case, the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages.

It is insisted, however, that, where there is "gross negligence," the jury can properly give exemplary damages. There are many cases to this effect. The difficulty is, that they do not define the term with any accuracy; and, if it be made the criterion by which to determine the liability of the carrier beyond the limit of indemnity, it would seem that a precise meaning should be given to it. This the courts have been embarrassed in doing, and this court has expressed its disapprobation of these attempts to fix the degree of negligence by legal definitions. In *The Steamboat New World v. King*, 16 How. 474, Mr. Justice Curtis, in speaking of the three degrees of negligence, says, —

"It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree thus described not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions, that the rules themselves can scarcely be said to have a general operation. If the law furnishes no definition of the terms 'gross negligence' or 'ordinary negligence' which can be applied in practice, but leaves it to a jury to determine in each case what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned."

Some of the highest English courts have come to the conclusion that there is no intelligible distinction between ordinary and gross negligence. Redf. on Car., sect. 376. Lord Cranworth, in *Wilson v. Brett*, 11 M. & W. 113, said that gross negligence is ordinary negligence with a vituperative epithet; and the Exchequer Chamber took the same view of the subject. *Beal v. South Devon Railway Co.*, 3 H. & C. 327. In the Common Pleas, *Grill v. General Iron Screw Collier Co.*, Law Reps., C. P. 1, 1865-66, was heard on appeal. One of the points raised was the supposed misdirection of the Lord Chief Justice who tried the case, because he had made no distinction between gross and ordinary negligence. Justice Willes, in deciding the point, after stating his agreement with the dictum of Lord Cranworth, said, —

"Confusion has arisen from regarding 'negligence' as a positive instead of a negative word. It is really the absence of such care as

it was the duty of the defendant to use. 'Gross' is a word of description, and not of definition; and it would have been only introducing a source of confusion to use the expression 'gross negligence' instead of the equivalent, — a want of due care and skill in navigating the vessel, which was again and again used by the Lord Chief Justice in his summing up."

"Gross negligence" is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term "ordinary negligence;" but, after all, it means the absence of the care that was necessary under the circumstances. In this sense the collision in controversy was the result of gross negligence, because the employees of the company did not use the care that was required to avoid the accident. But the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted. To do this, there must have been some wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train; and the court, therefore, misdirected the jury.

For this reason the judgment is reversed, and a new trial ordered.

GALBRAITH v. WEST END STREET RAILWAY.

Supreme Court of Massachusetts, April, 1896. 165 Mass. 572.

THE case is stated in the opinion.

LATHROP, J. This is an action of tort, under the St. of 1886, c. 140,¹ by the administratrix of the estate of James Galbraith, to recover damages for the death of her husband, caused by injuries received by him on February 6, 1894, while attempting to cross the tracks of the defendant's railway, on Main Street in Cambridge. Just before the accident, the intestate was driving along First Street in his cart. He drove out of First Street, which does not cross Main Street, but, for the purpose of getting on the right hand side of Main Street, he proceeded straight ahead to cross Main Street.

In the Superior Court, the jury returned a verdict for the defendant, and the case comes before us on exceptions taken by the plaintiff to the refusal of the presiding judge to give certain requests for instructions, and there are also exceptions to certain portions of the charge. The judge gave the first and eighth requests for instructions, and refused to give the second, third, fourth, fifth, sixth and seventh.

¹ See Acts of 1907, ch. 392.

The second request was properly refused. The plaintiff, in his argument, has assumed that this request placed the parties in a condition where the intestate was on the track, in the act of crossing; but this is not stated in the request, and in fact the terms of the request show that it was intended to apply to a time before the intestate got upon the track. There was conflicting evidence in the case as to the speed with which the electric car was coming, and as to what was done by the motorman, and the jury were fully instructed upon this branch of the case.

The third request was properly refused. It was incumbent upon the plaintiff, under the St. of 1886, c. 140, to show that her intestate was in the exercise of "due diligence." While the intestate had a right to cross the street, the electric car had also a right to proceed on its course; but both were bound to use proper care to avoid a collision. *Driscoll v. West End Street Railway*, 159 Mass. 142. *Glazebrook v. West End Street Railway*, 160 Mass. 239. The defendant corporation is not liable for the act of the motorman, unless he was either unfit or there was gross negligence or carelessness on his part. There was no evidence that the motorman was unfit, and it was a question for the jury whether the intestate exercised due diligence, and whether the motorman was grossly negligent or careless.

The fourth request was rightly refused, and the law on this point was correctly stated in the instructions given to the jury.

The fifth, sixth and seventh requests relate to the term "gross negligence." The plaintiff contends that the word "gross" has no more effect than the word "due" or "ordinary." But while this view has been adopted in some jurisdictions, it never has been the law here. The term "gross negligence" means something more than a want of ordinary care. It is used not only in the St. of 1886, c. 140, but also in the Pub. Sts. c. 73, § 6¹; c. 112, § 212²; c. 202, § 34.³ See *Copley v. New Haven and Northampton Co.*, 136 Mass. 6; *Debbs v. Old Colony Railroad*, 154 Mass. 402, 404; *Sullivan v. New York, New Haven, & Hartford Railroad*, 154 Mass. 524; *Manley v. Boston & Maine Railroad*, 159 Mass. 493; *Mullen v. Springfield Street Railway*, 164 Mass. 450.

The remaining exceptions relate to specific portions of the charge. The plaintiff contends that the jury might have been misled by what was said in regard to railroads and steam cars. But we do not understand that the judge intended to instruct the jury that electric cars might run at the same rate of speed as cars on a road operated by steam. See *Doyle v. West End Street Railway*, 161 Mass. 533. The jury were carefully instructed that they were to inquire whether this car, at and before the time of the collision, was moving at an excessive

¹ Rev. Laws, ch. 70, § 6.

² Rev. Laws, ch. 111, § 267; Act of 1897, ch. 392.

³ Rev. Laws, ch. 207, § 30.

rate of speed, in view of the situation; and they were told to take into consideration the character of the street, whether there were dwellings along the line of it, whether other streets crossed Main Street or came into it; to determine upon all the evidence what the rate of speed was, and whether it was an excessive rate of speed, and whether the motorman was or was not in fault in not checking the speed of his car; by which we presume the judge meant in not checking it sooner, for there is no doubt that it was checked to some extent.

The last exception relates to what was said as to the right of the intestate to cross Main Street. We have already stated, in considering the third request for instructions, that this right was not absolute; and we see no objection to that portion of the charge which left to the jury the question whether the intestate was in the exercise of reasonable care in not turning to the left as soon as he reached Main Street, rather than to attempt to cross the tracks when a car was coming. It was correctly said that "a man has the right, under the law in this Commonwealth, to drive upon either side of the street, or any part of the street, excepting only that, in case of vehicles meeting, when a man who is driving meets a carriage going in the same direction or going in the other direction, then the law provides what he shall do;"¹ and also in what follows this.

We are, therefore, of opinion that the plaintiff has shown no ground of objection, and that the exceptions must be

Overruled.

PATTON v. TEXAS, ETC., RAILWAY COMPANY.

Supreme Court of the United States, October, 1900. 179 U. S. 658.

PLAINTIFF in error, plaintiff below, brought his action against the defendant to recover for injuries sustained while in its employ as fireman. A judgment in his favor was reversed on April 10, 1894, by the Circuit Court of Appeals. 23 U. S. App. 319; 9 C. C. A. 487. On a second trial in the Circuit Court the judge directed a verdict for the defendant, upon which judgment was rendered. This judgment was affirmed by the Circuit Court of Appeals, 37 C. C. A. 56, and thereupon the case was brought here on error.

The facts were that plaintiff was a fireman on a passenger train of the defendant, running from El Paso to Toyah and return. Some three or four hours after one of those trips had been made and while the engine of which he was fireman was being moved in the railroad yards at El Paso, plaintiff attempted to step off the engine, and in doing so the step turned and he fell so far under the engine that the wheels passed over his right foot, crushing it so that amputation

¹ Rev. Laws, ch. 54.

became necessary. Plaintiff alleged that the step turned because the nut which held it was not securely fastened; that the omission to have it so fastened was negligence on the part of the company, for which it was liable.

MR. JUSTICE BREWER. The plaintiff's contention is that the trial court erred in directing a verdict for the defendant and in failing to leave the question of negligence to the jury.

That there are times when it is proper for a court to direct a verdict is clear. "It is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Phoenix Ins. Co. v. Doster*, 106 U. S. 30, 32; *Griggs v. Houston*, 104 U. S. 553; *Randall v. Baltimore & Ohio Railroad*, 109 U. S. 478, 482; *Anderson County Commissioners v. Beal*, 113 U. S. 227, 241; *Schofield v. Chicago & St. Paul Railway Co.*, 114 U. S. 615, 618;" *Delaware &c. Railroad v. Converse*, 139 U. S. 469, 472. See also *Aerkfetz v. Humphreys*, 145 U. S. 418; *Elliott v. Chicago, Milwaukee &c. Railway*,¹ 150 U. S. 245.

It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them. *Richmond & Danville Railroad v. Powers*, 149 U. S. 43.

Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions.

While it would needlessly prolong this opinion to quote all the testimony, it is proper that its salient features should be noticed. The single negligence charged is in the failure to have the engine step securely fastened. That step, a shovel-shaped piece of iron, is firmly

¹ Post, p. 129.

fixed to a rod of iron about an inch in diameter and eighteen inches in length, which passes up through the iron casting at the rear of the engine, about six or eight inches thick. A shoulder to this rod fits underneath the casting and the part passing through above has threads on the upper end upon which a nut is screwed firmly down on the casting, fastening the rod so that it will not move. That the step, rod and nut were in themselves all that could be required is not disputed. That the nut was properly screwed on at El Paso, before the engine started on its trip, is shown; the plaintiff, who assisted there, testifying to the fact. The engineer testified that he used the step both on the trip to Toyah and the return trip to El Paso and found it secure, and there is nothing to contradict this evidence. The engineer in his report of needed work both at Toyah and on his return at El Paso did not mention the step. He certainly supposed it secure. Competent inspectors were provided by the company both at El Paso and Toyah, and neither of them detected any failure in the secure fastening of the step by the nut. All of the witnesses except the superintendent and foreman of defendant testified that if the nut had been securely fastened at El Paso it would not have worked loose in making the trip from El Paso to Toyah and return by the ordinary jar and running of the engine; that it might be loosened by the step striking something. The superintendent and foreman testified from an experience of twenty years with engines that it might work loose on such trip, but that it was impossible to tell whether it would or not.

It was the duty of the fireman to clean the cab and all that portion of the engine above the running board, and to keep the oil cans and lubricators filled with oil. It was not necessary for him to attend to this work until eight hours after the engine arrived at El Paso, though it was more convenient to do so while the engine was hot and the oil warm, as it would take less time than when the engine was cooled off. After the engine reached El Paso the fireman and the engineer would get off and it would be taken charge of by the yardmen, who would detach it from the train, take it to the yard, coal and sand it and do all things necessary except the matter of repair, then place it in the round house where it would be cleaned by employees other than the fireman in all its parts beneath the running board, and inspected by the machinist and repaired; and after that the fireman would have ample time for all the duties imposed upon him before the engine started on another trip. All this the plaintiff knew, and simply took the time he did for his work for his own convenience. On this particular day he did not commence work until three or four hours after the arrival of the train at El Paso. Prior to that time the engine had been coaled up, the coal being placed in the tender back of the engine. Some of the pieces of coal were from a foot to eighteen inches in length and from six to eight inches in width, and very

heavy, and one of them falling off might strike the step. The engine had not at the time of the accident reached the round house for inspection and repair, and this the plaintiff knew.

From this outline it appears that the master provided perfectly suitable appliances, and appliances in good condition; that they were properly secured when the engine started on its trip, and that it is impossible to tell from the testimony how the step was loosened. It may have been from the ordinary working of the engine, the possibility of which was testified to by the superintendent, who had had long experience with engines. It may have been because the step struck something on its trip, which striking might produce that result according to the testimony of other experts who denied that the ordinary working of the engine would loosen it. We say this notwithstanding the testimony of the plaintiff that the step did not hit anything on the trip, for the step was on the right side of the engine, the side occupied by the engineer, and therefore a striking might have occurred without the knowledge of the plaintiff, whose work did not call him to that side of the engine. It may have resulted from the dropping on the step of some of the large lumps of coal which were thrown into the tender after reaching El Paso. We are not insensible of the matter to which the plaintiff calls especial attention, to wit, a conflict between the testimony given by Alexander Mitchell, the round house foreman at Toyah, at the first trial, and that given by him at the last. At the first trial he testified that the step was not taken off at Toyah. In the last that it was. He also testified that though taken off it was securely fastened before the train left. The inference, of course, sought to be drawn is that the testimony of this witness is unreliable; that it is to be believed that he unscrewed the nut, but not to be believed that he screwed it up tightly, and therefore another possibility of the cause of the loosening of the step is introduced into this case. But giving full weight to this suggestion, it still appears that it is a mere matter of conjecture as to how the step became loose.

On the other hand, it must be remembered that the plaintiff, who knew that the engine was to be taken to the round house at El Paso and inspected and repaired before he was called upon to perform any duties upon it, for his own convenience, before such inspection and repair went on the engine and attempted to discharge his duties of cleaning, etc. If he, knowing that there was to be an inspection and repair and that he had ample time thereafter to do his work, preferred not to wait for such inspection and repair but to take the chances as to the condition of the engine, he ought not to hold the company responsible for a defect which would undoubtedly have been disclosed by the inspection and then repaired.

Upon these facts we make these observations: First. That while in the case of a passenger the fact of an accident carries with it a

presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely,¹ *Stokes v. Saltonstall*, 13 Pet. 181; *Railroad Company v. Pollard*, 22 Wall. 341; *Gleeson v. Virginia Midland Railroad*, 140 U. S. 435, a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *Texas & Pacific Railway v. Barrett*, 166 U. S. 617. Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence — the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. Third. That while the employer is bound to provide a safe place and safe machinery in which and with which the employee is to work, and while this is a positive duty resting upon him and one which he may not avoid by turning it over to some employee, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe. *Hough v. Railway Company*, 10 Otto, 213, 218; *Baltimore & Ohio Railroad v. Baugh*, 149 U. S. 368, 386; *Baltimore & Potomac Railroad v. Mackey*, 157 U. S. 72, 87; *Texas & Pacific Railway v. Archibald*, 170 U. S. 665, 669. He is bound to take reasonable care and make reasonable effort, and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care — reasonableness depending upon the danger attending the place or the machinery.

The rule in respect to machinery, which is the same as that in respect to place, was thus accurately stated by Mr. Justice Lamar, for this court, in *Washington & Georgetown Railroad v. McDade*, 135 U. S. 554, 570:

“Neither individuals nor corporations are bound, as employers, to insure the absolute safety of machinery or mechanical appliances

¹ See *Byrne v. Boadle*, post, p. 132, and *Benedick v. Potts*, post, p. 133.

which they provide for the use of their employees. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was unknown to the employee or servant."

Tested by these rules we do not feel justified in disturbing the judgment approved as it was by the trial judge and the several judges of the Circuit Court of Appeals. Admittedly, the step, the rod, the nut, were suitable and in good condition. Admittedly, the inspectors at El Paso and Toyah were competent. Admittedly, when the engine started on its trip from El Paso the step was securely fastened, the plaintiff himself being a witness thereto. The engineer used it in safety up to the time of the engine's return to El Paso. The plaintiff was not there called upon to have anything to do with the engine until after it had been inspected and repaired. He chose, for his own convenience, to go upon the engine and do his work prior to such inspection. No one can say from the testimony how it happened that the step became loose. Under those circumstances it would be trifling with the rights of parties for a jury to find that the plaintiff had proved that the injury was caused by the negligence of the employer.

The judgment is

Affirmed.

ELLIOTT v. CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY.

Supreme Court of the United States, October, 1893. 150 U. S. 245.

ACTION in Dakota Territory for damages against a railway company for causing the death of the plaintiff's husband, by negligence. The facts are stated in the opinion of the court.

MR. JUSTICE BREWER. The question in this case is as to the liability of the company for the death of John Elliott. The company made three defences: One, that it was guilty of no negligence; second, that if there were any negligence, it was that of a fellow-servant; and third, that Elliott was guilty of contributory negligence. The Supreme Court of the Territory, in its opinion filed when the case was first in that court, considered the last two defences as sustained, and because thereof reversed the judgment in favor of the plaintiff. All of them have been presented and fully argued in this court, but as we consider the third sufficient, it is unnecessary to notice the first

two. We are of opinion that the deceased was guilty of contributory negligence, such as to bar any recovery. It is true that questions of negligence and contributory negligence are ordinarily questions of fact to be passed upon by a jury; yet when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. *Railroad Co. v. Houston*, 95 U. S. 697; *Schofield v. Chicago, Milwaukee, & St. Paul Railroad*, 114 U. S. 615; *Delaware, Lackawanna, &c. Railroad Co. v. Converse*, 139 U. S. 469; *Aerkfetz v. Humphreys*, 145 U. S. 418.

What then are the facts concerning the accident? It took place at a station called Meckling, a hamlet of two or three houses, and of so little importance that at the time the company had no station agent there. The main track of the defendant's road ran eastward and westward in a straight line, and the ground was level. On the north side of this track was a siding seven hundred and twenty-eight feet in length from switch to switch, and distant from the main track at the maximum, sixteen feet. This siding was the only extra track at the place. About one hundred feet east from the west switch was the depot, on the south of the track, and some ten feet therefrom. Two hundred feet east of that was a small car house, sixteen feet from the track. These were the only buildings on the depot grounds. No cars were standing on the track or siding. The day was clear, and there was nothing to prevent the deceased from seeing all that was going on. He was foreman of a section gang, and had been working on this track for ten or more years. In expectation of a coming freight train his men had placed their hand-car on the siding. The train was due at 8.25 A. M., but was perhaps five or ten minutes late. It came from the west, and at this station made a double flying switch. This was accomplished by uncoupling the train at two places, thus breaking it into three sections. The first section, consisting of the engine and eighteen cars, moved along the main track; but before the balance of the train reached the switch—its speed having been checked by brakes—that was turned so that two cars, constituting the second section and under the control of a brakeman, passed on to the siding; the rear section having been still further checked by brakes, the switch was reset so that it passed on to the main track, following the first section. The rear section consisted of a flat car, a box car, a caboosc, and an empty passenger coach, and was under the care of the conductor and one brakeman. As the second section was thrown by the flying switch on the siding, two of the men started to push the hand-car towards the east, so as not to be struck by the approaching freight cars. The deceased at the time the first section passed the car house was standing some sixteen feet west thereof, and four or five feet from the track, talking with one of his men. After a short conversation the latter started towards the depot, while the

deceased walked eastward along the track until he had passed a few feet beyond the car house, when he started hastily toward the siding. His attention had apparently been called by the approach of the two cars on the siding to the hand-car, for he made some call to the men who were pushing that hand-car. He crossed the main track diagonally, his face turned eastward. The rear section, coming along from the west, struck and crushed him. This rear section, when it passed the depot, was moving slowly, not faster than a walk, as one of the witnesses testified. That it was moving quite slowly is evident from the fact that it came to a stop after two cars and the caboose had passed over the body of the deceased, and this though no special effort was made to check them after the deceased had been struck, the conductor and brakeman on that section being unaware of the accident. When he started to cross the track, this approaching section was not to exceed twenty-five or thirty feet from him.

It thus appears that the deceased, an experienced railroad man, on a bright morning, and with nothing to obstruct his vision, starts along and across a railroad track with which he was entirely familiar, with cars approaching and only twenty-five or thirty feet away, and before he gets across that track is overtaken by those cars and killed. But one explanation of his conduct is possible, and that is that he went upon the track without looking to see whether any train was coming. Such omission has been again and again, both as to travellers on the highway and employees on the road, affirmed to be negligence. The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom. It may be, as is urged, that his motive was to assist in getting the hand-car out of the way of the section moving on the siding. But whatever his motive, the fact remains that he stepped on the track in front of an approaching train, without looking, or taking any precautions for his own safety.

This is not a case in which one, placed in a position of danger through the negligence of the company, confused by his surroundings, makes perhaps a mistake in choice as to the way of escape, and is caught in an accident. For here the deceased was in no danger. He was standing in a place of safety on the south side of the main track. He went into a place of danger from a place of safety, and went in without taking the ordinary precautions imperatively required of all who place themselves in a similar position of danger.

The trial court was right in holding that he was guilty of contributory negligence. So without considering the other questions presented in the record, the judgment will be

Affirmed.

BYRNE v. BOADLE.

Court of Exchequer of England, Michaelmas Term, 1863. 2 Hurl. & C. 722.

DECLARATION. For that the defendant, by his servants, so negligently and unskilfully managed and lowered certain barrels of flour by means of a certain jigger-hoist and machinery attached to the shop of the defendant, situated in a certain highway, along which the plaintiff was then passing, that, by and through the negligence of the defendant by his said servants, one of the said barrels of flour fell upon and struck against the plaintiff, whereby the plaintiff was thrown down, wounded, lamed, and permanently injured, and was prevented from attending to his business for a long time, to wit, thence hitherto, and incurred great expense for medical attendance, and suffered great pain and anguish, and was otherwise damnified. Plea, not guilty.

At the trial before the learned assessor of the Court of Passage at Liverpool, the evidence adduced on the part of the plaintiff was as follow: A witness named Critchley said: "On the 18th July, I was in Scotland Road, on the right side going north; defendant's shop is on that side. When I was opposite to his shop, a barrel of flour fell from a window above in defendant's house and shop, and knocked the plaintiff down. He was carried into an adjoining shop. A horse and cart came opposite the defendant's door. Barrels of flour were in the cart. I do not think the barrel was being lowered by a rope. I cannot say: I did not see the barrel until it struck the plaintiff. It was not swinging when it struck the plaintiff. It struck him on the shoulder and knocked him towards the shop. No one called out until after the accident." The plaintiff said: "On approaching Scotland Place and defendant's shop, I lost all recollection. I felt no blow. I saw nothing to warn me of danger. I was taken home in a cab. I was helpless for a fortnight." (He then described his sufferings.) "I saw the path clear. I did not see any cart opposite defendant's shop." Another witness said: "I saw a barrel falling. I don't know how, but from defendant's." The only other witness was a surgeon, who described the injury which the plaintiff had received. It was admitted that the defendant was a dealer in flour.

It was submitted, on the part of the defendant, that there was no evidence of negligence for the jury. The learned assessor was of that opinion, and non-suited the plaintiff, reserving leave to him to move the Court of Exchequer to enter the verdict for him with £50 damages, the amount assessed by the jury. Rule nisi to enter verdict for the plaintiff.

POLLOCK, C. B. We are all of opinion that the rule must be absolute to enter the verdict for the plaintiff. The learned counsel was quite right in saying that there are many accidents from which no

presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can a presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence,¹ and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are *prima facie* responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case upon the evidence comes to this; a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises and who is responsible for the acts of his servants who had the control of it; and in my opinion the fact of its falling is *prima facie* evidence of negligence, and the plaintiff who was injured by it is not bound to show that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

BRAMWELL, CHANNELL and PIGOTT, BB, concurred.

Rule absolute.

BENEDICK v. POTTS.

Supreme Court of Maryland, June, 1898. 88 Maryland, 52.

ACTION for negligence. The facts are stated in the opinion.

McSHERRY, J. This is an action to recover damages for a personal injury, and the single question which the record presents is whether there was legally sufficient evidence of the defendant's imputed negligence to carry the case to the jury. The facts are few and simple. The defendant, who is the appellee in this Court, was, at the time the occurrences about to be stated took place, engaged in running amusements at Tolchester Beach, a pleasure or excursion resort in Kent County. He owned and operated a mimic railway called Pike's Peak railroad. This is a wooden structure covering a space one hundred and fifty feet long and sixty-five feet wide. It is elevated thirty-five

¹ That is, ordinarily.

feet at its highest point. From this point a circular, or rather, an elliptical, inclined track runs downward, making three circuits before reaching the ground. The total length of this spiral track is about two thousand feet. Open and uncovered cars, weighing about six hundred pounds and having two horizontal seats wide enough for two passengers each, are hoisted up an incline to the highest point of the railway and are then run by gravity down and around the circular track to the ground. In making the descent the cars pass through a tunnel which is part of the structure and which is located about the middle of the last circle nearest the ground. This tunnel is one hundred and fifty feet long and completely encases that portion of the track and hides the cars and their occupants from all observation when passing through it. The roof of the tunnel is flat, and is covered with tongue and grooved boards running crosswise and securely nailed to rails. Down the centre of this roof and on its inner surface there is a narrow board two and a half or three inches wide which is fastened to the roof by wire nails that are clinched on the outside. The cars are provided with handles for the occupants to grasp during the rapid descent. In August, eighteen hundred and ninety-five, the appellant in company with his wife, his sister-in-law and Miss Magee visited Tolchester Beach. Whilst there, he, his sister-in-law and Miss Magee entered one of these cars, the two ladies occupying the front seat and the appellant the rear one. The car was started and made the descent, but when it reached the ground at the end of the track, the appellant was not in it, though as it entered the tunnel he was seen to be upon it. Search was at once made and he was found inside the tunnel in an unconscious condition with a wound upon his head. He was carried out and taken back to Baltimore and after several days was restored to consciousness. For the injuries thus sustained this suit was brought. There was some evidence tending to show that a part of the board running down the centre of the tunnel roof had been slabbed off at one point, but there was nothing to indicate when that had happened. The car did not leave the track. No part of it was shown to be out of repair; the track was not defective, and no explanation is given in the record as to what caused the injury. The appellant distinctly stated that he made no effort to rise as he passed through the tunnel and that he did not release or relax his grasp on the sides of the car. He was on the car when it passed into the tunnel, he was not on it when it emerged. How he got off is not shown. Upon this state of facts the trial Court instructed the jury that there was no legally sufficient evidence to show that the defendant, the appellee, had been guilty of negligence, and the verdict and judgment were accordingly entered for the defendant. Thereupon the plaintiff brought up the record to this Court by appeal.

It is a perfectly well-settled principle that to entitle a plaintiff to

recover in an action of this kind he must show not only that he has sustained an injury but that the defendant has been guilty of some negligence which produced that particular injury. The negligence alleged and the injury sued for must bear the relation of cause and effect. The concurrence of both and the nexus between them must exist to constitute a cause of action. As an injury may occur from causes other than the negligence of the party sued, it is obvious that before a liability on account of that injury can be fastened upon a particular individual, it must be shown, or there must be evidence legally tending to show, that he is responsible for it; that is, that he has been guilty of the negligence that produced or occasioned the injury. In no instance can the bare fact that an injury has happened, of itself and divorced from all the surrounding circumstances, justify the inference that the injury was caused by negligence. It is true that direct proof of negligence is not necessary. Like any other fact, negligence may be established by the proof of circumstances from which its existence may be inferred. But this inference must, after all, be a legitimate inference and not a mere speculation or conjecture. There must be a logical relation and connection between the circumstances proved and the conclusion sought to be adduced from them. This principle is never departed from, and in the very nature of things it never can be disregarded. There are instances in which the circumstances surrounding an occurrence and giving a character to it are held, if unexplained, to indicate the antecedent or coincident existence of negligence as the efficient cause of an injury complained of. These are the instances where the doctrine of *res ipsa loquitur* is applied. This phrase, which literally translated means that "the thing speaks for itself," is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident; and the doctrine which it embodies, though correct enough in itself, may be said to be applicable to two classes of cases only, viz., first, "when the relation of carrier and passenger exists and the accident arises from some abnormal condition in the department of actual transportation; second, where the injury arises from some condition or event that is in its very nature so obviously destructive of the safety of person or property and is so tortious in its quality as, in the first instance at least, to permit no inference save that of negligence on the part of the person in the control of the injurious agency." Thomas on Neg. 574. But it is obvious that in both instances more than the mere isolated, single, segregated fact that an injury has happened must be known. The injury, without more, does not necessarily speak or indicate the *cause* of that injury — it is colorless; but the act that produced the injury being made apparent may, in the instances indicated, furnish the ground for a presumption that negligence set that act in motion. The maxim does not go to the

extent of implying that you may from the mere fact of an injury infer what physical act produced that injury; but it means that when the physical act has been shown or is apparent and is not explained by the defendant, the conclusion that negligence superinduced it may be drawn as a legitimate deduction of fact. It permits an inference that the known act which produced the injury was a negligent act, but it does not permit an inference as to what act did produce the injury. Negligence manifestly cannot be predicated of any act until you know what the act is. Until you know *what* did occasion an injury, you cannot say that the defendant was guilty of some negligence that produced that injury. There is, therefore, a difference between inferring as a conclusion of fact *what* it was that did the injury; and inferring from a known or proven act occasioning the injury that there was negligence in the act that did produce the injury. To the first category the maxim *res ipsa loquitur* has no application; it is confined, when applicable at all, solely to the second. In no case where the thing which occasioned the injury is unknown has it ever been held that the maxim applies; because when the thing which produced the injury is unknown it cannot be said to speak or to indicate the existence of causative negligence. In all the cases, whether the relation of carrier and passenger existed or not, the injury alone furnished no evidence of negligence — something more was required to be shown. For instance: In *Penn. R. R. Co. v. MacKinney*, 124 P. St. 462, it was said: "A passenger's leg is broken, while on his passage, in a railroad car. This mere fact is no evidence of negligence on the part of the carrier until something further be shown. If the witness who swears to the injury testifies also that it was caused by a crash in a collision with another train of cars belonging to the same carrier, the presumption of negligence immediately arises; not, however, from the fact that the leg was broken, but from the circumstances attending the fact." And so in *Byrne v. Boadle*, 2 Hurl. & Colt. 728,¹ there was proof not only of an injury but there was evidence to show *how* the injury happened, and the presumption of negligence was applied, not because of there being an injury, but because of the way or manner in which the injury was produced. And in *Howser's case*, 80 Md. 146, the injury was caused by cross-ties falling from a moving train upon the plaintiff who was walking by the side of the track and the presumption of negligence was allowed, not as an inference deducible from the injury itself, but as a conclusion resulting from the method in which and the instrumentality by which the injury had been occasioned. In the recent case of *Consolidated Traction Co. v. Thalheimer*, Court of Errors and Appeals, N. J. 2 Amer. Neg. Rep. 196, it appeared that the plaintiff was a passenger of the appellant, and, having been notified by the conductor that the car was approaching the point where she desired to alight, got up

¹ *Ante*, p. 132.

from her seat and walked to the door while the car was in motion, and, while going through the doorway, she was thrown into the street by a sudden lurch and thus injured. The Court said: "At all events, the fact that such a lurch or jerk occurred, as would have been unlikely to occur if proper care had been exercised, brings the case within the maxim *res ipsa loquitur*." The inference of negligence arose not from the injury to the passenger, but from the *act* that caused the injury. In *B. & O. R. R. v. Worthington*, 21 Md. 275, the train was derailed in consequence of an open switch, and it was held that the injury thus inflicted on the passenger was presumptive evidence of negligence — not that the mere injury raised such a presumption, but that the injury caused in the way and under the circumstances shown indicated actionable negligence unless satisfactorily explained.

Whether, therefore, there be a contractual relation between the parties or not, there must be proof of negligence or proof of some circumstances from which negligence may be inferred, before an action can be sustained. And whether you characterize that inference an ordinary presumption of fact, or say of the act that caused the injury, the thing speaks for itself, you assert merely a rebuttable conclusion deduced from known and obvious premises. It follows, of course, that when the *act* that caused the injury is wholly unknown or undisclosed, it is simply and essentially impossible to affirm that there was a negligent act; and neither the doctrine of *res ipsa loquitur* nor any other principle of presumption can be invoked to fasten a liability upon the party charged with having by negligence caused the injury for the infliction of which a suit has been brought.

Now, in the case at bar there is no evidence that the car on the track was out of repair. The car went safely to its destination carrying the other occupants. There is no evidence that the roof of the tunnel struck the appellant, or that the fact that a small part of the central plank of the tunnel roof had been slabbed off had the most remote connection with the accident. It is a case presenting not a single circumstance showing *how* or by what agency the injury occurred, and in which, with nothing but the isolated fact of the injury having happened, being proved, it is insisted that the jury shall be allowed to speculate as to the cause that produced it, and then to *infer* from the cause thus assumed but not established, that there was actionable negligence. It is not an attempt to infer negligence from an apparent cause, but to infer the cause of the injury from the naked fact of injury, and then to superadd the further inference that this inferred cause proceeded from negligence. If in *Howser's* case, *supra*, there had been no other evidence than the mere *fact* of an injury, it cannot be pretended that the jury would have been allowed to speculate as to *how* the injury had occurred.

The appellant was on the car when it entered the tunnel; he was not on the car when it emerged, but was found in an unconscious

state in the tunnel. There was no defect in or abnormal condition affecting the means of actual transportation. The other occupants of the car passed safely through. What caused the appellant to be out of the car is a matter of pure conjecture. No one has explained or attempted to explain how he got where he was found. Indeed the two persons who occupied the front seat were ignorant of the appellant's absence from the car until it had reached its destination, and the appellant himself distinctly testified that he did not relax his hold to the car and did not attempt to rise but lowered his head as he entered the tunnel. All that is certain is, that he was injured in *some* way and he asks that the jury may be allowed, in the absence of all explanatory evidence, to infer that some act of a negligent character for which the appellee is responsible, caused the injury sustained by the appellant. No case has gone to that extent and no known principle can be cited to sanction such a position. There has been no circumstance shown which furnishes the foundation for an inference of negligence; and the circumstances which have been shown obviously do not bring the case within the doctrine of *res ipsa loquitur*. There was, consequently, no error in the ruling complained of and the judgment of the Circuit Court must be affirmed.

Judgment affirmed with costs above and below.

McCULLY v. CLARK.

Supreme Court of Pennsylvania, 1861. 40 Pa. St. 399.

THIS was an action on the case brought in the District Court at July term, 1859, by James McCully against Thomas S. Clark and William Thaw, partners, doing business as Clark & Thaw, to recover damages for the destruction by fire of a warehouse and contents, owned by him, on Penn Street, in the city of Pittsburg, alleged to have been occasioned by the default of the defendants in "negligently and wilfully" permitting a large quantity of burning coal to remain for a long time unextinguished upon their premises, immediately adjoining the wall of the warehouse which was destroyed. The testimony was to the effect that plaintiff's property, of the value of \$30,000, was consumed by fire on the morning of July 20, 1853; that the premises had been closed up as usual on the previous evening, no person remaining therein, and no fire being kept thereupon; that on the 26th day of the previous month the warehouse immediately adjoining thereto, and occupied by the defendants, who were transporters upon the Pennsylvania Canal, was burned to the ground by a fire originating in and communicated by a boat belonging to the said defendants; that the said last-mentioned warehouse, being of the height of a single story,

and without any cellar underneath the same, was used by the defendants for the deposit of coal, belonging to themselves, and stored for the purpose of transportation therein; that, at the time of the said fire, a large quantity of the coal, amounting to several thousand bushels, was piled up to the depth of some five or six feet against the wall next adjoining to the warehouse of the plaintiff; that the said coal was ignited at the time of the destruction of the defendants' warehouse, and continued to burn until the 20th of July next following thereafter; that the said plaintiff, apprehending danger therefrom, complained on several occasions to the mayor of said city, and that, notwithstanding occasional intermitted efforts on the part of the defendants to extinguish the same by throwing water thereon, the coal continued to burn until the period of the destruction of the plaintiff's property.

The plaintiff further offered evidence to show that his warehouse was strongly and substantially built, with cellar and other independent walls throughout; and that the fire had its commencement in the ends of the timbers inserted in that part of the defendants' wall, against which the said mass of burning coal was piled. He also offered evidence to prove that the application of water, as shown by the testimony, would be only to intensify the heat; that the only feasible means of extinguishing it would have been by taking the same away, and that a large portion of the coal was converted by the operation into coke, and in that shape afterward disposed of and removed by the defendants.

The defence was, that the fire did not originate from the burning of the coal in the ruins of defendants' warehouse; that the defendants were guilty of no negligence in relation to the coal burning in the ruins of their warehouse, but had employed frequent, efficient, and faithful means to extinguish the fire down to the evening immediately preceding the burning of plaintiff's warehouse, at which time it was apparently extinguished, no fire being afterwards seen by any one in the ruins of defendants' warehouse; and that if there was in fact, or if the plaintiff supposed there was, the slightest danger of injury to his own property from the cause assigned, *he* was guilty of the grossest negligence in neglecting all efforts to prevent the injury, and in not giving notice to defendants, he having been frequently at the ruins while the fire was burning, and in that he had no fear of it.

Under the above facts the plaintiff requested the court to charge the jury:—

1. That if the jury believe that the defendants had a large pile of coal placed in their warehouse against the side walls thereof, for a distance of from sixty to ninety feet or thereabouts, and in height against said walls from five to nine feet or thereabouts, and extending out from said walls from eight to twelve feet or thereabouts, at the same or a greater height; and thence extending some eight or ten

feet further, diminishing from said height to almost nothing; and that the stone wall of plaintiff's warehouse was built close up against the stone wall of defendants' warehouse, against which said coal was piled; and the brick wall of plaintiff's warehouse ran close alongside of the brick wall of defendants' warehouse, against which said coal was piled; and if the jury believe that said coal was set on fire by the burning of defendants' warehouse, on June 26, 1853, and continued to burn until July 20, 1853, the defendants being aware of the fact, still in possession, and having caused water to be thrown upon the same at different intervals during said period, without extinguishing the same; and if the jury further believe that fire was communicated to plaintiff's warehouse and its contents from the fire in said coal pile, and that the same were thereby burned up on July 20, 1853; then, from these facts, as a matter of law, the defendants are guilty of negligence, and the plaintiff is entitled to recover the value of his warehouse and its contents.

2. That if the jury find the facts as stated in the foregoing point, and the court should decline to charge that, as a matter of law, the plaintiff is entitled to recover, then the court is requested to charge that these facts throw upon defendants the burden of proof in the case; and the jury must be satisfied that said fire in said coal pile could not have been extinguished by the defendants from June 26 to July 20; otherwise the plaintiff is entitled to a verdict for the value of his warehouse and its contents.

3. That there is no evidence in the cause of any such negligence on part of plaintiff as will prevent his recovering.

4. That the defendants permitting a large mass of coal. piled against the walls of their warehouse, immediately adjacent to the walls of plaintiff's warehouse, to be on fire for some twenty-four days in the most busy part of the city of Pittsburg, they knowing the fact, was a violation of their duties as citizens; a nuisance and gross negligence towards the plaintiff and his property; and if plaintiff's property was set on fire thereby or therefrom, defendants are liable for the loss, and there is no evidence in this case by which they are entitled to escape from such liability.

5. That plaintiff had no right to go on the private property of defendants to extinguish this fire; but if the court should think he had, by reason of the fire being a public nuisance, still he was not bound to do so, and his failure so to do was not such negligence on his part as will prevent his recovering.

6. That the leaving of a large pile of burning coal belonging to the defendants, upon their own premises, in immediate proximity to the plaintiff's warehouse, in the centre of a populous city, is negligence per se; and if the plaintiff's house was set on fire thereby, the defendants are liable to the extent of the loss thereby occasioned.

7. That it was the duty of the defendants to extinguish the said

fire, and, if not otherwise practicable, to remove the coal itself for that purpose; and that the law casts no duty on the plaintiff to undertake the labor and incur the expense of doing this himself.

8. That if the law did make it the duty of the plaintiff to take any steps himself, that duty was discharged by an application to the mayor, and such application will relieve him from the imputation of negligence. The court below (Williams, J.), after reciting the main facts of the case, charged the jury as follows:—

“The plaintiff’s right to maintain this action, and to recover damages for the destruction of his warehouse and its contents by fire, and the defendants’ liability therefor, depend upon well settled principles of law, easily understood and readily applied.

“1. The plaintiff is not entitled to maintain this action, and to recover damages for his loss, unless the fire which destroyed his warehouse was occasioned by the negligence of the defendants. Negligence is the very gist of this action; and, therefore, unless the defendants’ negligence was the occasion of the fire, the plaintiff is not entitled to recover.

“2. The plaintiff was bound to use ordinary and reasonable care and diligence for the preservation of his property, and he is not entitled to recover if his own negligence contributed to, or was the cause of, its destruction. If the fire which caused the loss of the warehouse and its contents was occasioned by the mutual negligence of both the plaintiff and defendants, the former is not entitled to recover damages for the loss which he has sustained. Negligence is the want of proper care, caution, and diligence,—such care, caution, and diligence as, under the circumstances, a man of ordinary and reasonable prudence would exercise. It consists in nonfeasance; that is, omitting to do or not doing something which ought to be done, which a reasonable and prudent man would do; and a misfeasance, that is, the doing something which ought not to be done, something which a reasonable man would not do, or doing it in such a manner as a man of ordinary and reasonable prudence would not do it; in either case causing, unintentionally, mischief or injury to a third party.

“The jury will then determine from the evidence:—

“1. What was the cause of the burning of plaintiff’s warehouse? Was it set on fire by the burning of the coal in the ruins of the warehouse in the possession and occupancy of the defendants? Was the wall of McCully’s warehouse so heated by the burning of the coal in the ruins of the warehouse of Clark & Thaw, that it set the girders in the wall on fire, and thus communicated the fire to the whole building?

“2. If so, were the defendants guilty of negligence in allowing the coal pile, in the ruins of their warehouse, to burn in the way and for the length of time it did? If the defendants were guilty of negligence,

it was because they did not extinguish the fire, owing to the fact that either they did not use the proper means, or did not employ them with sufficient vigor, energy, and perseverance.

"3. Was the plaintiff without fault, or was he guilty of negligence; and was his negligence the cause or occasion of the fire, or did it contribute thereto? Would his warehouse have been burned if he had exercised ordinary and reasonable diligence?" The court called the attention of the jury to the facts and circumstances in evidence, relied on by the counsel on both sides as tending to show the origin and cause of the fire; and also as tending to show whether their respective clients had or had not been guilty of negligence, and then proceeded in substance as follows:—

"The jury will determine for themselves what was the origin of the fire; whether or not it was set on fire by the burning coal in the ruins of the defendants' warehouse; and unless satisfied that it was, they will find for the defendants. But if the jury find that plaintiff's warehouse was set on fire by the pile of burning coal in the ruins of defendants' warehouse, and that the defendants did not use ordinary care and skill and the proper means to extinguish it, and that they were guilty of negligence in this respect; and that in consequence thereof plaintiff's warehouse was set on fire, then the jury will find for the plaintiff damages for the full amount of his loss, unless they find that his own want of reasonable care contributed to or was the occasion of his loss. The plaintiff is not entitled to recover if the loss would not have occurred except for his own negligence.

"The counsel on both sides have submitted a number of points upon which they have prayed the instruction of the court, but so far as they are not answered in the charge they are refused. The court declines to charge, *as matter of law*, either that there was or was not negligence on the part of either the plaintiff or defendants. Whether either or both the parties were or were not guilty of negligence, are questions of fact for the determination of the jury, from all the evidence in the case."

Under these instructions there was a verdict and judgment in favor of defendants. The case was then removed into this court by the plaintiff, who assigned for error the refusal of the court below to affirm the points submitted, and to charge, *as matter of law*, either that there was or was not negligence on the part either of the plaintiff or defendants, and the referring the same, as a question of fact for the jury, without any evidence of negligence on the part of the plaintiff.

STRONG, J. No complaint is made of the instruction given to the jury in this case. None could be, with any shadow of reason. The charge was a clear, accurate, and comprehensive statement of the principles of law applicable to the facts of which evidence had been given. It is not alleged that it contained any thing erroneous. The

complaint here is, that the learned judge did not say more; that he did not take the facts away from the jury, and instruct as matter of law that the plaintiff was entitled to recover.

The action was brought for negligence. The point of the accusation was, that the defendants had so negligently kept and continued a certain pile of coal which had taken fire, and so wrongfully and negligently failed to extinguish the fire, that the warehouse of the plaintiff, with its contents, had been ignited and destroyed. Whether the defendants had been guilty of the negligence charged, was, therefore, the principal subject of inquiry; in other words, whether they had exercised such care and diligence to prevent injury to the property of the plaintiff, as a prudent and reasonable man, under the circumstances, would exercise. Now, it is plain that what is such a measure of care is a question peculiarly for a jury. A higher degree is doubtless demanded under some circumstances than under others. It varies with the danger. And when the standard shifts with the circumstances of the case, it is in its very nature incapable of being determined as a matter of law, and must be submitted to the jury. There are, it is true, some cases in which a court can determine that omissions constitute negligence. They are those in which the precise measure of duty is determinate, the same under all circumstances. When the duty is defined, a failure to perform it is, of course, negligence, and may be so declared by the court. But where the measure of duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others, where both the duty and the extent of performance are to be ascertained as facts, a jury alone can determine what is negligence, and whether it has been proved. Such was this case. The question was not alone what the defendants had done, or left undone; but, in addition, what a prudent and reasonable man would ordinarily have done under the circumstances. Neither of these questions could the court solve. When, therefore, the court was asked to instruct the jury, that if they believed certain facts were proved, of which evidence had been given, the defendants were guilty of negligence, and the plaintiff was entitled to recover, the instruction was properly refused. It could not have been given without determining, as a matter of law, what care and caution a prudent and reasonable man would have exercised in circumstances similar to those in which the defendants were placed. The points proposed to the court assumed that the defendants were under obligation completely to extinguish the fire in the coal pile within a designated time. They did not propose to submit to the jury even so much as whether it could have been done, much less whether every reasonable effort had not been made to extinguish it. Nor were the facts which the court was called upon to declare conclusive proof of negligence, and entitling the plaintiff to recover, all the material facts of which there was evidence in the case. There were others of a qual-

ifying nature, important to the inquiry, whether the defendants had been culpably negligent. Without considering these other facts, the court must have taken but a one-sided view of the case. Besides all this, the court could not have directed a verdict for the plaintiff, as requested, without deciding that there was no evidence at all of concurring negligence on the part of the plaintiff. But even if the loss of the plaintiff was occasioned by want of due caution on the part of the defendants, the case was not destitute of evidence that the plaintiff's negligence contributed to the loss.

For similar reasons, the court was right in declining to charge the jury that certain facts enumerated, even though not constituting negligence in law, threw upon the defendants the burden of proof in the case, and that the jury must be satisfied that the fire could not have been extinguished within a designated time, or the plaintiff would be entitled to a verdict. The instruction asked for assumed that it was for the court to determine precisely what was due diligence and caution, and to rule that nothing less than the complete extinguishment of the fire in the specified time, if possible, would bring their conduct up to the standard by which prudent and reasonable men are guided. This point, also, as did the others, ignored pertinent and important facts in evidence, which must have been considered in determining whether there was negligence at all; and, if affirmed, it might have given the plaintiff a verdict, even though the plaintiff's own negligence may have concurred in causing his loss. In actions for negligence the burden of proof is upon the plaintiff. The law will not presume it for him. And in cases like this, where all the evidence must be considered in order to ascertain whether negligence existed, it is a mistake to suppose that a court may be required to single out some of the facts proved and declare that they remove the burden of proof from the shoulders of the plaintiff, and cast it on the defendant. That can only be done where a court can determine what constitutes guilt. It is the province of the jury to balance the probabilities, and determine where the preponderance lies. The case relied upon by the plaintiff in error, *Piggot v. The Eastern Counties Railway Company*, 3 Com. B. 229, 54 Eng. C. L. Rep. 228, is in perfect harmony with these doctrines. In that case the defendants ran a locomotive, the sparks from which set fire to the property of the plaintiff. Using a dangerous agent, the law required of them to adopt such precautions as might reasonably prevent damage to the property of others. Some precaution was a duty. They had no right to run their locomotive without it. Failure to adopt some precaution was, therefore, failure to discharge a defined duty, and was negligence. In such a case the court might well say, as was said, that a fire caused by running the engine, without any evidence of precaution, established a *prima facie* case of negligence. Even this, however, was not laid down as a matter of law to the jury. It was only said by one of

the judges, in commenting on the evidence, and in reply to a rule for a new trial, on the ground that the verdict was against the weight of the evidence. It was, therefore, no more than an assertion that the jury might have drawn the inference of negligence from the facts that a locomotive had kindled a fire, and that there had been no precaution. That was a very different case from the present. Even if the court might in that case have declared the effect of the evidence, it must have been because the duty of the defendants was unvarying and well defined by the law. Here the standard of duty was to be found as a fact, as well as the measure of its performance, and there was evidence of earnest, continued, and apparently successful efforts to extinguish the fire in the coal. This disposes of all the assigned errors, except the fifth and eighth. Of them we need only say that they were not insisted on in argument, and we have not been able to discover that they point to any error committed.

Judgment affirmed.

WALKER'S ADMINISTRATOR *v.* POTOMAC, ETC., R. CO.

Supreme Court of Appeals of Virginia, March, 1906. 105 Va. 226.

THE case is stated in the opinion.

BUCHANAN, J. This action was instituted by the plaintiff in error against the defendant company to recover damages for the death of his intestate, caused by the alleged negligence of the defendant.

The evidence shows that the defendant has a turntable on its own premises near Orange Court House, located about 220 feet from its station or depot; about 360 feet from the public road which runs from the depot to the village of Orange Court House; close by a mill-road, which is not public; fifty or sixty feet from what is known as the horse-show grounds; about 340 feet from any inhabited house; and in an open and unoccupied field; that boys were in the habit of playing ball on the horse-show grounds, between which and the railway land there was no fence; that boys frequently rode on the turntable, and had once been seen riding on it by the depot agent; that some years before the accident two boys had been injured in playing with the turntable, which was of the ordinary kind in use, and was neither locked nor fastened; that on the Sunday evening of the accident the plaintiff's intestate, who was a little over twelve years of age, with two other boys of about the same age, was pushing the turntable around the track preparing to jump on it, and as he did so one of his feet was caught between the rails and mashed, causing lockjaw, from the effects of which he died.

Upon the trial of the cause there was a verdict and judgment in favor of the defendant. To that judgment this writ of error was awarded.

The only question involved in this writ of error is whether or not, under the facts of the case, which are not disputed, the defendant was guilty of negligence in leaving the turntable in the place where it was, on its own premises, unfenced and unfastened.

The general rule is that a landowner does not owe to a trespasser (and the same is true of a bare licensee) the duty of having his land in a safe condition for a trespasser to enter upon. The latter has ordinarily no remedy for harm happening to him from the nature of the property upon which he intrudes, and he takes upon himself the risks of the condition of the land, and to recover for an injury happening to him he must show that it was wantonly inflicted, or that the owner or occupant being present could have prevented the injury by the exercise of ordinary care after discovering the danger. *Norfolk & Western Ry. Co. v. Wood*, 99 Va. 156, 158-59; *Hortenstein's Admr. v. Va.-Carolina Ry. Co.*, 102 Va. 914, 918; *Williamson v. Southern Ry. Co.*, 104 Va. 146; *Bishop on Non-Contract Law*, sec. 845; *Cooley on Torts* (2d ed.) 791-94.

It is not denied, as we understand the counsel for the plaintiff, that such is the common law doctrine as to adult trespassers and bare licensees; but his contention is that, under certain circumstances, such as are disclosed by this record, it is not the rule as applied to children. To sustain that contention he relies upon the case of *Sioux City R. Co. v. Stout*, 17 Wall. 657, and the cases which follow it.

While these cases, which are known as "The Turntable Cases," fully sustain the plaintiff's contention, there is a remarkable conflict of authority upon the subject. The doctrine announced in the *Stout* Case has been discussed in numerous cases by the appellate courts of many of the States of this country, with the result that there are many authorities sustaining the doctrine in its broadest sense; while many utterly repudiate it, and others give it a qualified recognition and practically limit it to railroad turntable cases. A question or problem which has given rise to such a wide divergence of opinion is not of easy solution.

As this is the first case involving this precise question which has ever come to this court, so far as the reported decisions show, we are at liberty to follow that line of decisions which, in our judgment, is more nearly in accord with settled principles of law and is sustained by the better reason.

In order for the plaintiff to recover in this case it must appear that the defendant company owed his intestate some duty which it failed to discharge; for where there is no duty there can be no negligence. *N. & W. Ry. Co. v. Wood*, supra; *Hortenstein's Admr. v. Va.-Car. Ry. Co.*, supra; *Carson Lime Co. v. Rutherford*, 102 Va. 252.

As before stated, the common law imposes no duty upon a land-

owner to use care to keep his premises in such condition that trespassers and bare licensees going thereon may not be injured. This is unquestionably the rule as to adults, and the weight of authority as it seems to us, shows that it is the rule as to children.

The cases cited in the case of *Sioux City R. Co. v. Stout* to sustain the opposite view, do not, as it seems to us, do so. Those cases come within other rules, or within well defined exceptions to the general rule that a landowner owes no duty to a trespasser, adult or infant, except that he must not wantonly or intentionally injure him or expose him to danger. This is clearly shown, we think, by the supreme Judicial Court of Massachusetts, in the case of *Daniels v. N. Y. & N. E. R. Co.*, 154 Mass. 349, and by Judge Peckham (now of the Supreme Court of the United States), in delivering the opinion of the Court of Appeals of New York, in *Walsh v. Fitchburg, &c.*, R. Co., 145 N. Y. 301.

The conclusion reached in those cases is fully sustained by the following cases (and many more might be cited), which are all "Turntable Cases," or cases in which the doctrine of those cases was involved. *Frost v. Eastern R. Co.*, 64 N. H. 220; *Delaware, &c., Ry. Co. v. Reich* (N. J.), 40 Atl. 682; *Uttermohlen v. Boggs Run, &c., Co.*, 50 W. Va. 457; *Ryan v. Towar*, 128 Mich. 463; *Paolino v. McKendall*, 24 R. I. 432; *Dobbins v. Missouri &c., Ry. Co.*, 91 Texas, 60; *Savannah, &c., Ry. Co. v. Beavers*, 113 Ga. 398.

The same conclusion was reached by this court in *Clark v. City of Richmond*, 83 Va. 355. The city had made an excavation upon the land of another, into which a child of six years fell and was injured. In denying the child the right to recover in that case it was said that where the excavation is so near the highway that a traveller, by making a false step, or being affected by sudden giddiness, might be thrown into the excavation and injured, there would be a liability. "But if, in order to reach the place of danger, the party injured must become a trespasser upon the premises of another, the case will be different, for in such a case there is no breach of duty from which the liability to respond in damages can result."

But in some of the "Turntable Cases" the right to recover is maintained upon the doctrine of constructive invitation—that is, that if a person is allured, or tempted by some act of a railroad company to enter upon its lands, he is not a trespasser; and it is held that leaving a turntable unfastened or unguarded, under circumstances similar to those disclosed by this record, is such an act.

One of the cases cited and relied on to sustain this contention is the case of *Bird v. Holbrook*, 4 Bing. 628. The defendant in that case, for the protection of his property, some of which had been stolen, set a spring gun, without notice, in a walled garden some distance from his house. The plaintiff, who climbed over the wall in pursuit of a stray fowl, having been injured, it was held that the

landowner was liable. The express object in setting the spring gun was to inflict injury — to do an intentional wrong.

Another case relied on is that of *Townsend v. Wathen*, 9 East 277. That was a case where a landowner had set traps on his premises near the highway, and baited them with decaying meat, so that its scent would extend not only to the highway, but beyond to the private premises of the plaintiff, whose dogs, scenting the meat, came upon the defendant's premises and were caught in a trap and thereby killed. It was held in that case that a man had no right to set traps of a dangerous description in a situation to invite, and for the very purpose of inviting, his neighbor's dogs, as it would compel them by their instinct to come into his traps. The act of the defendant in that case was not in the prosecution of his legitimate business, but as the court said was a mere malicious attempt, successful in its result, to entice his neighbor's animals upon his premises.

The gravamen of both these actions was the wrongful intention of the defendants. To liken the case of a railroad company erecting a turntable on its own premises for its own necessary purposes in the regular conduct of its business, with no desire or intention to injure anyone, to the case of a landowner setting spring guns or traps on his land for the express purpose of doing an unlawful or malicious injury, is, as it seems to us, to lose sight of the difference between negligence and intentional wrongdoing. *Walsh v. Fitchburg, &c., R. Co.* supra; *Dobbins v. Mo., Kansas & Tex. Ry. Co.* (Texas) 41 S. W. 62.

"The viciousness of the reasoning," said the Court of Appeals of New Jersey, in the case of *Delaware, &c., R. Co. v. Reich*, supra, in discussing this question, "which fixes liability upon the landowner because the child is attracted, lies in the assumption that what operates as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption is not warranted. As said by Mr. Justice Holmes (now a member of the Supreme Court of the United States), in *Holbrook v. Aldrich*, 168 Mass. 16, 'Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it' — or hold parties bound to contemplate infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen."

No landowner supposes for a moment that by growing fruit trees near the highway, or where boys are accustomed to play, however much they may be tempted to climb the trees and take his fruit, he is extending to them an invitation to do so, or that they would be any the less trespassers if they did go into his orchard because of the temptation. No one believes that a landowner, as a matter of fact, whether a railroad company or a private individual, who makes changes on his own land in the course of a beneficial user, which

changes are reasonable and lawful, but which are attractive to children and may expose them to danger if they should yield to the attraction, is by that act alone inviting them upon his premises.

This doctrine of constructive invitation is not sustained, as it seems to us, by the English cases cited to sustain it, and has been utterly rejected by the highest courts of New Hampshire, Massachusetts, New York, New Jersey, Rhode Island, Michigan and West Virginia. In several other States it is limited in its operation to turntable cases. See *Frost v. Eastern, &c., Ry. Co.*, supra; *Daniels v. N. Y. & N. E. R. Co.*, supra; *Walsh v. Fitchburg, &c., R. Co.*, supra; *Delaware, &c., Ry. Co. v. Reich*, supra; *Ryan v. Towar*, supra; *Paolino v. McKendall*, supra; *Dobbins v. Missouri, &c., Ry. Co.* supra; *Savannah, &c., Ry. Co. v. Beavers*, supra.

The maxim, "*Sic utere tuo ut alienum non laedas*," has been quoted in some of the "Turntable Cases," and relied on as affording a decisive reason, or ground, for establishing a duty upon the railway company, and as per se justifying a recovery against it. There may be more, but there is one conclusive answer to the argument based on that maxim, and that is, that it refers only to acts of the landowner, the effects of which extend beyond the limits of his property.

In *Deane v. Clayton*, 7 Taunton 489, Gibbs, J., said: "I know it is a rule of law that I must occupy my own so as to do no harm to others, but it is their legal rights only that I am bound not to disturb; subject to this qualification I may occupy or use my own as I please. It is the rights of others, and not their security against the consequences of (their) wrongs that I am bound to regard."

In *Knight v. Albert*, 6 Pa. St. 472, where an effort was made to apply the maxim to sustain an action by the owner of cattle which had trespassed upon the lands of another and had been injured by reason of the unsafe condition of the property, Chief Justice Gibson said: "A man must use his property so as not to incommode his neighbor; but the maxim extends only to neighbors who do not, uninvited, interfere with it or enter upon it. . . . If it were not so, a proprietor could not sink a well, or a saw pit, dig a ditch or mill-race, or open a stone quarry, or a manhole on his land, except at the risk of being made responsible for consequential damage from it which would be a most unreasonable requirement." *Ryan v. Towar*, supra. See article by Judge Smith on Landowners' Liability to Children, etc., 11 Harvard Law Review 349-373, 434, 448, in which there is a valuable discussion of that whole subject.

Upon neither of the grounds relied on do we think that the common law makes it the duty of a landowner to have his premises in a safe condition for the uninvited entry of adults or children, nor to take affirmative measures to keep them off of his premises or to protect them after entry; and this view is strengthened by the fact that so many of the courts which have adopted the doctrine of the

"Turntable Cases" restrict it as far as possible to turntables, and refuse to follow it to its natural and logical consequences. For if it be a rule of the common law that a landowner, who, in the reasonable and lawful use of his property, makes changes thereon which have the double effect of attracting young children to the land and at the same time exposing them to serious danger, is guilty of negligence unless he exercises reasonable care for their safety, either in keeping them off the land, or in protecting them after their entry thereon, the rule would apply not only to railroad companies and their turntables, but to all landowners who in the use of their land maintain upon it dangerous machinery, or conditions which present a like attractiveness and temptation to children. The common law applies alike to all landowners under like conditions, and it would be an anomaly to hold that a doctrine or rule of the common law, which had its origin before there were either railroads or turntables, applies only to railroad companies in the use of their lands, upon which they have dangerous machinery. While the courts should and do extend the application of the common law to the new conditions of advancing civilization, they may not create a new principle or abrogate a known one.¹ If new conditions cannot be properly met by the application of existing laws, the supplying of the needed laws is the province of the Legislature, and not of the judicial department of the government. *Connelly v. Western Tel. Co.*, 100 Va. 59. The Legislature can change the common law as far as may be necessary to regulate the use of turntables and other dangerous appliances, and leave untouched the common law rights of the ordinary landed proprietor.

The Court of Appeals of New Jersey, in refusing to follow the doctrine of the "Turntable Cases," said, that the doctrine would require a similar rule to be applied to all owners and occupiers of land in respect to any structure, machinery, or implement maintained by them, which presented a like attractiveness and furnished a like temptation to children. "He who erects a tower capable of being climbed, and maintains thereon a windmill to pump water; . . . he who leaves his mowing machine, or dangerous agricultural implement, in his fields; he who maintains a pond in which boys may swim in summer, and on which they may skate in winter; would seem to be amenable to this rule of duty. Climbing, playing at work, swimming and skating, are attractions almost irresistible to children, and every landowner or occupier may well believe that such attractions will lead young children into danger. Many other cases of like character might be imagined. In all of them the 'Turntable Cases,' if correct, would charge the owner . . . with the duty of taking care to preserve young children thus tempted on his farm from harm. The fact that the doctrine extends to such a variety of cases, and to cases in respect to which the idea of such a duty is novel and startling, causes strong

¹ See Bigelow on Torts, 8th ed. ch. 1, § 1. Centralization and the Law, Lecture 1.

suspensions of the correctness of the doctrine, and leads us to question it." *Delaware, &c., R. Co. v. Reich*, supra; *Turess v. N. Y., &c., R. Co.*, 61 N. J. L. 314; *Uttermohlen v. Boggs Run, &c., Co.*, supra.

The Supreme Court of Minnesota, which was one of the first to give its adherence to the turntable doctrine (*Kiffe v. Milwaukee, &c., Ry. Co.*, 21 Minn. 207), in the subsequent case of *Stendal v. Boyd*, 73 Minn. 53, through its Chief Justice, said: "The doctrine of the 'Turntable Cases' is an exception to the rules of non-liability of a landowner for accidents from visible causes to trespassers on his premises, and if the exception is to be extended to this case (a dangerous excavation filled with water on a city lot, in which a little boy had been drowned), then the rule of non-liability as to trespassers must be abrogated as to children, and every owner of property must at his peril make his premises child-proof."

We will conclude this opinion with the following extract from the very able opinion of Judge Denman, speaking for the Supreme Court of Texas (another of the states which had followed the turntable doctrine), in the case of *Dobbins v. Missouri, &c., Ry. Co.*, 41 S. W. 62, as expressing our views: "The difficulty," he said, "about those cases ('Turntable Cases') is, that they either impose upon owners of property a duty not before imposed by law, or they leave to a jury to find legal negligence in cases where there is no legal duty to exercise care. In those cases the courts yielding to the hardships of individual instances where owners have been guilty of moral, though not legal wrongs, in permitting attractive and dangerous turntables and water holes to remain unguarded on their premises in populous cities, to the destruction of little children, have passed beyond the safe and ancient landmarks of the common law, and assumed legislative functions, imposing a duty where none before existed. As a police measure the law-making power may, and doubtless should, without unduly interfering with or burdening private ownership of land, compel the inclosure of pools, etc., situated on private property in such close proximity to thickly settled places as to be unusually attractive and dangerous, and impose criminal or civil liability, or both, for failure to comply with the requirements of such law. When such a duty is imposed the courts may properly enforce it or allow damages for its breach, but not before."

We are of opinion that there is no error in the judgment complained of, and that it should be affirmed.

Affirmed.

INDERMAUR *v.* DAMES.

Exchequer and Exchequer Chamber of England, 1866, 1867. L. R. 1 C. P. 274;
L. R. 2 C. P. 318.

ACTION for damages alleged to be due to negligence.

The facts are as follows: The plaintiff, who was a journeyman gas-fitter, was, at the time of the accident hereinafter mentioned, in the employ of one Duckham, a gas engineer and fitter, who was the patentee of an improved self-acting gas-regulator. The defendant was a sugar-refiner, having extensive premises in Whitechapel. In June, 1864, Duckham, through one Hargreaves, his agent, agreed with the defendant, who was necessarily a large consumer of gas, to fit up on his premises two of his regulators, upon the terms mentioned in the following memorandum: "I hereby agree to attach two of my patent, self-acting gas-regulators to your meter in area; and, should I fail to effect a saving of from 15 to 30 per cent on your previous consumption, I will remove the regulators, and restore the fittings at my own expense. Should I effect such saving, the machines will be considered, after test, as purchased, and a three-years guarantee given with them. The price to be (two 2-inch), £18."

On Saturday, the 25th of June, Hargreaves went to the defendant's premises, pursuant to appointment, for the purpose of fixing the apparatus. He was accompanied by the plaintiff and another workman in Duckham's employ, named Bristow, and a lad. The plaintiff, however, not being upon that occasion quite sober, Mr. Woods, the defendant's manager, would not allow him to go upon the premises, and the regulators were fixed by Bristow, assisted by the lad, and the work was duly completed. In order to test the regulators, and ascertain that they answered the warranty as to saving in the consumption of gas, it was necessary for the workmen of the patentee to inspect every burner on the premises, to see that they were in a proper state. Bristow having had to do the work almost single-handed, it was too late to make the required inspection on the Saturday night; and accordingly Hargreaves went to the premises on the following Tuesday, accompanied by the plaintiff, in order to examine the several burners, and so test the apparatus. Before going there for that purpose, Hargreaves cautioned the plaintiff, saying: "Now, mind, Indermaur, sugar-houses are very peculiar places; they neither allow candles or lucifers. We must keep our eyes open. There is a man to go with us with a light. I shall follow the man, and you keep close to me." When they arrived at the premises, Hargreaves and the plaintiff, accompanied by one of the defendant's workmen, with a light, proceeded to the first floor, and, after examining one of the burners, went round to another part of the floor for the purpose of

inspecting another. In the mean time, the plaintiff, who had left a pair of plyers at the spot they first went to, turned back to fetch them; but, in returning, instead of going round the way Hargreaves and the defendant's man had gone, he walked straight across towards them, not perceiving an intervening hole in the floor, and fell through to the floor below, a depth of about thirty feet, and fractured his spine.

The hole in question was a shaft or shoot four feet three inches square, communicating from the basement to the several floors of the building. It was fenced at each side, but open back and front. It was necessary to the defendant's business to have such a shaft; and it was necessary that it should, whilst in use for the raising or lowering of goods, and occasionally also for purposes of ventilation, be open and unfenced; and there was no evidence to show that it was usual in buildings of the kind to adopt the precaution of fencing such shafts.

On the part of the defendant it was submitted that there was no duty or obligation on him to fence the shaft, and consequently no cause of action; and reliance was placed upon *Wilkinson v. Fairrie*, 1 H. & C. 633; 32 L. J. Ex. 73. His lordship observed that, though as to persons employed in the business there might be no duty or obligation to fence, a very different degree of care might be due in the case of a person not so employed, but merely going there for a temporary lawful purpose, as this plaintiff did. He, however, reserved the point.

Several witnesses were then called on the part of the defendant; amongst others, Mr. Woods, the defendant's manager, who stated that the defendant's premises, which had been recently erected, were constructed in the same way as all sugar-refineries were constructed, and were not more than ordinarily dangerous; and that, if he had known that the plaintiff was coming to work upon the premises, he would not have allowed him to do so.

The evidence as to the number of lights on the floor at the time of the accident was conflicting. The plaintiff swore that there were only two; the defendant's witnesses that there were five, and that the light was ample. In his summing up, the Lord Chief Justice stated in substance as follows: "The plaintiff has to establish that there was negligence on the part of the defendant; that the premises of the defendant, to which he was sent in the course of his business as a gas-fitter, were in a dangerous state; and that, as between himself and the defendant, there was a want of due and proper precaution in respect of the hole in the floor. To my mind, there would not be the least symptom of want of due care as between the defendant and a person (permanently) employed on his premises, because the sugar-baking business requires a lift on the premises, which must be as well known to the persons employed there as the top of a staircase

in every dwelling-house. But that which may be no negligence towards men ordinarily employed upon the premises, may be negligence towards strangers lawfully coming upon the premises in the course of their business." And, after observing upon the facts, he told the jury, that, if they found that there was no negligence on the part of the defendant, or that there was want of reasonable care on the part of the defendant, but that there was also want of reasonable care on the part of the plaintiff, which materially contributed to the accident, the plaintiff was not entitled to recover; but that, if there was want of reasonable care in the defendant, and no want of reasonable care in the plaintiff, then the plaintiff was entitled to a verdict.

The jury returned a verdict for the plaintiff, damages £400.

Cur. adv. vult.

WILLES, J. This was an action to recover damages for hurt sustained by the plaintiff's falling down a shaft at the defendant's place of business, through the actionable negligence, as it was alleged, of the defendant and his servants.

At the trial before the Lord Chief Justice at the sittings here after Michaelmas Term, the plaintiff had a verdict for £400 damages, subject to leave reserved. A rule was obtained by the defendant, in last term to enter a nonsuit, or to arrest the judgment, or for a new trial because of the verdict being against the evidence. The rule was argued during the last term, before Erle, C. J., Keating and Montague Smith, JJ., and myself, when we took time to consider. We are now of opinion that the rule ought to be discharged.

It appears that the defendant was a sugar-refiner, at whose place of business there was a shaft four feet three inches square, and twenty-nine feet three inches deep, used for moving sugar. The shaft was necessary, usual, and proper in the way of the defendant's business. Whilst it was in use, it was necessary and proper that it should be open and unfenced. When it was not in use, it was sometimes necessary, with reference to ventilation, that it should be open. It was not necessary that it should, when not in use, be unfenced; and it might then, without injury to the business, have been fenced by a rail. Whether it was usual to fence similar shafts when not in use, did not distinctly appear; nor is it very material, because such protection was unquestionably proper, in the sense of reasonable, with reference to the safety of persons having a right to move about upon the floor where the shaft in fact was, because in its nature it formed a pitfall there. At the time of the accident it was not in use; and it was open and unfenced.

The plaintiff was a journeyman gas-fitter in the employ of a patentee who had supplied the defendant with his patent gas-regulator, to be paid for upon the terms that it effected a certain saving; and, for the purpose of ascertaining whether such saving had been effected,

the plaintiff's employer required to test the action of the regulator. He accordingly sent the plaintiff to the defendant's place of business for that purpose; and, whilst the plaintiff was engaged upon the floor where the shaft was, he (under circumstances as to which the evidence was conflicting, but) accidentally, and, as the jury found, without any fault or negligence on his part, fell down the shaft, and was seriously hurt.

It was argued that, as the defendant had objected to the plaintiff's working at the place upon a former occasion, he (the plaintiff) could not be considered as having been in the place with the defendant's leave at the time of the accident; but the evidence did not establish a peremptory or absolute objection to the plaintiff's being employed, so as to make the sending of him upon the occasion of the accident any more against the defendant's will than the sending of any other workman; and the employment, and the implied authority resulting therefrom to test the apparatus, were not of a character involving personal preference (*dilectus personæ*), so as to make it necessary that the patentee should himself attend. It was not suggested that the work was not journeyman's work.

It was also argued that the plaintiff was at best in the condition of a bare licensee or guest who, it was urged, is only entitled to use the place as he finds it, and whose complaint may be said to wear the color of ingratitude, so long as there is no design to injure him. See *Hounsell v. Smyth*, 7 C. B. N. s. 731; 29 L. J. C. P. 203.¹

We think this argument fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission. No sound distinction was suggested between the case of the servant and the case of the employer, if the latter had thought proper to go in person; nor between the case of a person engaged in doing the work for the defendant pursuant to his employment and that of a person testing the work which he had stipulated with the defendant to be paid for if it stood the test, whereby impliedly the workman was to be allowed an onstand to apply that test, and a reasonable opportunity of doing so. Any duty to enable the workman to do the work in safety seems equally to exist during the accessory employment of testing: and any duty to provide for the safety of the master workman seems equally owing to the servant workman whom he may lawfully send in his place.

It is observable that, in the case of *Southcote v. Stanley*, 1 H. & N. 247; 25 L. J. Ex. 339, upon which much reliance was properly placed for the defendant, Alderson, B., drew the distinction between a bare licensee and a person coming on business, and Bramwell, B., between active negligence in respect of unusual danger known to the host and

¹ But cf. *Davis v. Central Cong. Society*, post, p. 159.

not to the guest, and a bare defect of construction or repair, which the host was only negligent in not finding out or anticipating the consequence of. There is considerable resemblance, though not a strict analogy, between this class of cases and those founded upon the rule as to voluntary loans and gifts, that there is no remedy against the lender or giver, for damage sustained from the loan or gift, except in case of unusual danger known to and concealed by the lender or giver. *Macarthy v. Younge*, 6 H. & N. 329; 30 L. J. Ex. 227. The case of the carboy of vitriol, *Farrant v. Barnes*, 11 C. B. N. s. 553; 31 L. J. C. P. 237, was one in which this court held answerable the bailor of an unusually dangerous chattel, the quality of which he knew, but he did not tell the bailee, who did not know it, and who, as a proximate consequence of his not knowing, and without any fault on his part, suffered damage.

The cases referred to as to the liability for accidents to servants and persons employed in other capacities in a business or profession which necessarily and obviously exposes them to danger, as in *Seymour v. Maddox*, 16 Q. B. 326; 20 L. J. Q. B. 327, also have their special reasons. The servant or other person so employed is supposed to undertake not only all the ordinary risks of the employment into which he enters, but also all extraordinary risks which he knows of and thinks proper to incur, including those caused by the misconduct of his fellow-servants, not, however, including those which can be traced to mere breach of duty on the part of the master. In the case of a statutory duty to fence, even the knowledge and reluctant submission of the servant who has sustained an injury are held to be only elements in determining whether there has been contributory negligence: how far this is the law between master and servant, where there is danger known to the servant, and no statute for his protection, we need not now consider, because the plaintiff in this case was not a servant of the defendant, but the servant of the patentee. The question was adverted to, but not decided, in *Clarke v. Holmes*, 7 H. & N. 937; 31 L. J. Ex. 356.

The authorities respecting guests and other bare licensees, and those respecting servants and others who consent to incur a risk, being therefore inapplicable, we are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop: but it is obvious that this is only one of a class; for whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trap-door left open, unfenced and unlighted. *Lancaster Canal Company v. Parnaby*, 11 Ad. & E. 223; 3 P. & D. 162; per cur.,

Chapman v. Rothwell, E. B. & E. 168; 27 L. J. Q. B. 315, where *Southcote v. Stanley*, 1 H. & N. 247; 25 L. J. Ex. 339, was cited, and the Lord Chief Justice, then Erle, J., said: "The distinction is between the case of a visitor (as the plaintiff was in *Southcote v. Stanley*), who must take care of himself, and a customer, who, as one of the public, is invited for the purposes of business carried on by the defendant." This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessary visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master. The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

And, with respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

In the case of *Wilkinson v. Fairrie*, 1 H. & C. 633; 32 L. J. Ex. 73, relied upon for the defendant, the distinction was pointed out between ordinary accidents, such as falling down stairs, which ought to be imputed to the carelessness or misfortune of the sufferer, and accidents from unusual, covert danger, such as that of falling down into a pit.

It was ably insisted for the defendant that he could only be bound to keep his place of business in the same condition as other places of business of the like kind, according to the best known mode of construction. And this argument seems conclusive to prove that there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place could reasonably be, having regard to the contrivances necessarily used in carrying on the business. But we think the argument is inapplicable to the facts of this case: first, because it was not shown, and probably could not

be, that there was any usage never to fence shafts; secondly, because it was proved that, when the shaft was not in use, a fence might be resorted to without inconvenience; and no usage could establish that what was in fact necessarily dangerous was in law reasonably safe, as against persons towards whom there was a duty to be careful.

Having fully considered the notes of the Lord Chief Justice, we think there was evidence for the jury that the plaintiff was in the place by the tacit invitation of the defendant, upon business in which he was concerned; that there was by reason of the shaft unusual danger, known to the defendant; and that the plaintiff sustained damage by reason of that danger, and of the neglect of the defendant and his servants to use reasonably sufficient means to avert or warn him of it: and we cannot say that the proof of contributory negligence was so clear that we ought on this ground to set aside the verdict of the jury.

As for the argument that the plaintiff contributed to the accident by not following his guide, the answer may be, that the guide, knowing the place, ought rather to have waited for him; and this point, as matter of fact, is set at rest by the verdict.

For these reasons, we think there was evidence of a cause of action in respect of which the jury were properly directed; and, as every reservation of leave to enter a non-suit carries with it an implied condition that the court may amend, if necessary, in such a manner as to raise the real question, leave ought to be given to the plaintiff, in the event of the defendant desiring to appeal or to bring a writ of error, to amend the declaration by stating the facts as proved, — in effect, that the defendant was the occupier of and carried on business at the place; that there was a shaft, very dangerous to persons in the place, which the defendant knew and the plaintiff did not know; that the plaintiff, by invitation and permission of the defendant, was there near the shaft, upon business of the defendant, in the way of his own craft as a gas-fitter, for hire, &c., stating the circumstances, the negligence, and that by reason thereof the plaintiff was injured. The details of the amendment can, if necessary, be settled at chambers.

As to the motion to arrest the judgment, for the reasons already given, and upon condition that an amendment is to be made if and when required by the defendant, it will follow the fate of the motion to enter a nonsuit. The other arguments for the defendant, to which we have not particularly adverted, were no more than objections to the verdict as being against the evidence: but it would be wrong to grant a new trial without a reasonable expectation that another jury might take a different view of the facts; and, as the Lord Chief Justice does not express any dissatisfaction with the verdict, the rule upon this, the only remaining ground, must also be discharged.

Rule discharged.

The case was now carried by appeal to the Exchequer Chamber, where the judgment above pronounced was affirmed. L. R. 2 C. P. 317.

DAVIS *v.* CENTRAL CONGREGATIONAL SOCIETY.

Supreme Court of Massachusetts, September, 1880. 129 Mass. 367.

TORT for personal injuries sustained by the plaintiff, by falling over a wall on the defendant's premises. Trial in the Superior Court, before Gardner, J., who directed a verdict for the defendant, and reported the case for the determination of this court, in substance as follows:

On October 15, 1873, the defendant, a duly incorporated religious society, was the owner of a lot of land, with a meeting-house thereon, bounded northeasterly by Seaverns Avenue, and southeasterly by Elm Street, both public streets in Boston. A circular driveway or path, about eighteen feet wide, ran from near the corner of said street and avenue to the front doors of the meeting-house, and round to the street. This path was covered with concrete, and was smooth and level, and was the only means provided for access to and from Elm Street and the front doors of the meeting-house. The society maintained religious worship according to the usages of Congregational societies and churches. The church worshipping in the meeting-house was a voluntary association, united together by a covenant and articles of belief, and was a distinct body from the society, and had no control of the premises. Joseph B. Clark was the settled pastor over the society and church, but was not a member of the society. The care and control of the premises were intrusted to a prudential committee of five, chosen by the society. The pastor and deacons of the church had the right to grant the use of the meeting-house for religious meetings and services not inconsistent with the rights and purposes of the society.

The plaintiff, in order to show that she was invited to attend a meeting held at the meeting-house, offered evidence tending to prove that a meeting of the Suffolk South Conference of Churches was held on the afternoon and evening of October 15, 1873, in the defendant's meeting-house; that this conference was a voluntary association of thirty or thirty-four Congregational churches in Boston and vicinity, including the church worshipping with the defendant society, and the church in Brighton, of which the plaintiff was member; that this conference was a distinct organization from the several churches composing it, having its clerk, or scribe, and other officers; that, by the usages of this association, its meetings were held once in six months with the different churches composing it, each church taking

its turn, the place of the next meeting being determined at the conference last held; that the meeting of the conference to be held in October, 1873, should, by said usages, have been held with one of the other churches, and was actually appointed to be held at some other church, and not with the church worshipping with the defendant, but, the church at which the meeting was to be held being unable to have the conference, Joseph B. Clark, without consultation with the prudential committee or other officers of the defendant society, or with the deacons of the church, and without any consent on the part of the defendant, except such as may be inferred from the facts herein stated, gave permission to the scribe or other proper officers of the conference to hold the conference meeting at the defendant's meeting-house during the afternoon and evening of October 15, 1873, and the scribe, acting upon this permission, sent notices of the meeting to the several churches; that, in accordance with the usages of the conference, the notice contained a request that each church should choose two delegates to attend the meeting, and also contained a general invitation for the other members of the said several churches to attend; that this notice was given from the pulpit of the church in Brighton, of which the plaintiff was a member, and in like manner in the defendant's meeting-house on the Sunday next before the meeting.

Evidence was also offered tending to prove that it was the custom for members other than delegates to attend such meetings; that the delegates and officers of the conference when assembled had charge of the meeting, voted, and transacted such business and conducted such services as came before the meeting; and that the plaintiff was not a delegate to the meeting. There was evidence tending to show that some of the members of the defendant's prudential committee, and some or all of the deacons, were present when the notice of the meeting was given in the defendant's meeting-house, and that no action was ever taken by the defendant society or its officers as to objecting or consenting to the meeting being held according to said notice.

The plaintiff testified that on October 15, 1873, in pursuance of the invitation or notice aforesaid, and the custom aforesaid, she went from her house in Brighton to attend the meeting; that she had no business with the defendant society or its officers, and was not a delegate; that she attended for her own benefit and as a visitor, and that she had been in the habit of attending conference meetings with which her church was connected for forty years; that she was never before at the defendant's meeting-house, and in going had to inquire the way there; that at about three o'clock that afternoon she entered the circular path at the corner of said avenue and street, and passed through the same and entered the front door of the meeting-house; that there was no difficulty in passing over the walk safely in the daytime; that she did not notice the wall or embankment in the after-

noon, though there was nothing to prevent her seeing the same if she had looked, and that she remained within the meeting-house throughout the entire service, until the close thereof, at nine o'clock in the evening; that, at the close of the meeting in the evening, the plaintiff passed out of the front door, and as she was walking along the path towards the street, in the manner in which she usually walked, "not fast," she struck her right foot or leg against the wall, at a point where it was seven or eight inches high, and fell over the wall on to the sidewalk, and was injured; that said path at the time was filled with people passing out, and there were many persons before and behind her, and on her right hand; that she did not see the wall before she fell. Three friends who were with her, testified that they did not see the wall, and neither of them hit or walked against it.

The plaintiff, in order to show that the defendant was guilty of negligence in the construction and maintenance of the path, and that the same was dangerous, offered evidence tending to prove that there was a bank wall two and one-half feet high, extending the whole length of the northeasterly side of the defendant's land, the face of which wall formed the boundary line between the land and Seaverns Avenue; that the top of the wall was eighteen inches wide, and level; that the northeasterly line of the path, from the front door of the meeting-house to the point of its conjunction with said wall, was a curved line; that at the point of conjunction the walk and top of the wall formed a level surface; that from that point to the entrance to the premises the line of the path was a straight and descending line along the inner side of the wall, and formed an inclined plane; that at the point at which the plaintiff fell over the wall, the top of the wall was seven or eight inches higher than the path; that, at the time of the accident, there was no railing or other fence than the wall between the pathway and the avenue; that a railing or fence had been put there by the defendant since the accident; that the path was not lighted, except as far as it might be lighted from the gas-lights in the vestibule of the meeting-house, and a street gas-light, on the opposite side of Elm Street, about seventy feet distant, which has, since the accident, been moved by the city to the corner of said street and avenue.

The judge directed a verdict for the defendant. If the ruling was correct, judgment was to be entered on the verdict; otherwise, the verdict was to be set aside, and a new trial ordered.

COLT, J. To maintain this action, it must be shown that the defendant corporation was chargeable with some neglect of duty which it owed to the plaintiff, by reason of which she suffered the injury complained of. The injury was caused by falling over a wall by the side of a passageway leading from the street to the front entrance of the defendant's church edifice. It is alleged that this was danger-

ous because of the failure of the defendant to provide by railing or other suitable protection against such an accident.

The owner or occupier of real estate is under no obligation to keep the premises safe for those who enter without inducement or invitation, express or implied, and the plaintiff must show that at the time of the injury she was passing over the way in question by the invitation of the defendant, and not by mere license or permission. The fact that the plaintiff was induced by the defendant to enter upon a dangerous place without warning, is the negligence which entitles the plaintiff to recover. *Sweeny v. Old Colony & Newport Railroad*, 10 Allen, 368. *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216. *Larue v. Farren Hotel Co.*, 116 Mass. 67. *Severy v. Nickerson*, 120 Mass. 306.

The first question in the case is whether there was any evidence, which should have been submitted to the jury, that the plaintiff was induced by the express or implied invitation of the defendant to enter upon the premises.

[After stating the facts, the Court proceeded:]

This evidence would clearly justify a jury in finding that the plaintiff came by the defendant's invitation. The authority given by the defendant to the conference to hold its meeting in this place, implied an authority to secure an attendance by invitations given in the known and usual manner, and it is unnecessary to inquire whether the construction of this passageway, thus obviously left open to the free use of all who might desire to attend religious service in the church, would not in itself imply such an invitation as would impose on the defendant the duty of making it reasonably safe to those who in the exercise of due care might use it.

The application of the rules on which the defendant's liability depends is not affected by the consideration that this is a religious society, and that the plaintiff came solely for her own benefit or gratification. It makes no difference that no pecuniary profit or other benefit was received or expected by the society. The fact that the plaintiff comes by invitation is enough to impose on the defendant the duty which lies at the foundation of this liability; and that too although the defendant in giving the invitation was actuated only by motives of friendship and Christian charity. In *Sweeny v. Old Colony & Newport Railroad*, above cited, the defendant was held liable, because the plaintiff was induced to enter upon a private crossing over the railroad, although he had no business with the corporation, and simply attempted to cross for his own convenience. And this defendant, as an incorporated religious society and as owner and occupier of the premises in question, is subject to all the duties and liabilities which are incident to the ownership and possession of real estate.

On the question whether the defendant was chargeable with neglect of duty in not providing a reasonably safe way to and from the

church, we cannot say, as matter of law, that the construction, location and direction of the way, with the wall and declivity by its side, the want of a proper railing, and the insufficiency of light, would not justify a finding that in the night time it was unsafe for the use of a person exercising ordinary care and prudence. Nor can we say that the evidence shows conclusively that the plaintiff was not in the exercise of due care. *Mayo v. Boston & Maine Railroad*, 104 Mass. 137. But the fact that this court considers the case as one proper to be submitted to the jury on these points is not to be taken as an indication of an opinion that the finding should be for the plaintiff. It is not a question here of the preponderance of evidence; and it is often the duty of the court to submit a question of fact to the jury, on the plaintiff's request, when the weight of evidence may appear to be against him.

*New trial ordered.*¹

BOOMER *v.* WILBUR.

Supreme Court of Massachusetts, September, 1900. 176 Mass. 482.

TORT, for personal injuries occasioned to the plaintiff by the fall of brick and mortar from a chimney on the house of the defendants in Taunton upon the plaintiff while she was passing below on the sidewalk. At the trial in the Superior Court, before Bond, J., the jury returned a verdict for the plaintiff; and the defendants alleged exceptions, which appear in the opinion.

HAMMOND, J. The court instructed the jury in substance that where, under a contract between the owner of a house and the person doing the work, work is done upon the house, and the owner retains the right of access to and the control of the premises, and such work is ordinarily attended with danger to the public unless proper precautions are taken to avoid it, the owner is bound to the exercise of due care to see that such precautions are taken for the safety of the public; and if by reason of the failure to take such precautions a person lawfully on the street and in the exercise of due care is injured, the owner is answerable notwithstanding the work is being done under a contract between him and the contractor.

Having stated this as a general rule, the court applied it to this case as follows: "If the defendants employed a person to repair the chimneys on their buildings adjoining the highway under the contract, to repair them for a fixed sum, and the defendants retained the right, retained control, and the right of access to the building, and such work on the chimneys would ordinarily be attended with danger to the public unless proper precautions to avoid it were taken, the de-

¹ See *Indermaur v. Dames*, ante, p. 152.

defendants were bound to take proper precautions, or to see that proper precautions were taken, for the safety of the public; and if the plaintiff was injured while she was lawfully on the street, adjoining the defendants' premises, and in the exercise of due care, by reason of the failure of the defendants to take proper precautions, or by reason of their failure to see that proper precautions were taken, to avoid such injury, then the defendants are liable for the injury."

We understand these instructions to mean that, even if the defendants employed a competent, independent contractor to repair these chimneys, who was to do the work without any dictation or supervision on the part of the defendants over the details of the work or the manner in which it should be done, the defendants would be answerable for the failure of the contractor to take proper precautions to protect travellers upon the highway from falling bricks.

While the master is liable for the negligence of the servant, yet when the person employed is engaged under an entire contract for a gross sum in an independent operation, and is not subject to the direction and control of his employer, the relation is not regarded as that of master and servant, but as that of contractor and contractee; and in such case the general rule is that the negligence of the contracting party cannot be charged upon him for whom the work is to be done; and this rule is applicable even where the owner of the land is the person who hires the contractor, and for whose benefit the work is done. *Hilliard v. Richardson*, 3 Gray, 349. *Forsyth v. Hooper*, 11 Allen, 419. *Connors v. Hennessey*, 112 Mass. 96. *Harding v. Boston*, 163 Mass. 14, 18. There are, however, some well known exceptions to the rule. If the performance of the work will necessarily bring wrongful consequences to pass unless guarded against, and if the contract cannot be performed except under the right of the employer who retains the right of access, the law may hold the employer answerable for negligence in the performance of the work.

Woodman v. Metropolitan Railroad, 149 Mass. 335, was such a case, and the defendant was held liable for the act of an independent contractor hired by it to dig up and obstruct the streets for the purpose of laying down the track, upon the ground that the contract called for an obstruction to the highway which necessarily would be a nuisance unless properly guarded against.

The same principle is further illustrated in *Curtis v. Kiley*, 153 Mass. 123, and *Thompson v. Lowell*, *Lawrence & Haverhill Street Railway*, 170 Mass. 577.

Again, if the contract calls for the construction of a nuisance upon the land of the employer, he may be held answerable for the consequences. In *Gorham v. Gross*, 125 Mass. 232, the defendant had caused to be constructed by an independent contractor a party wall, half on the defendant's land and half upon adjoining land, and after it was completed and accepted it fell, causing damage to the property

of the adjoining landowner. There was evidence that the fall of the wall was occasioned by negligence in its construction. The court said that the wall as constructed was a nuisance "likely to do mischief," and held the defendant answerable for the damage caused by its fall.

To the same effect is *Cork v. Blossom*, 162 Mass. 330.

The instructions to the jury allowed them to find a verdict for the plaintiff, not upon the ground that the chimney was a nuisance "likely to do mischief," but upon the ground that the work of repair called for by the contract was necessarily a nuisance within the rule stated in *Woodman v. Metropolitan Railroad*, *ubi supra*, and other similar cases.

The work called for was the repair of chimneys. At most the bricks were to be taken off for a few feet and relaid. The work which was to be done was not such as would necessarily endanger persons in the street. It did not involve throwing the brick into the street, or causing or allowing them to fall so as to endanger persons travelling therein. It is plain that unless there was negligence in the actual handling of the brick, there could be no injury to the passing traveller. The case very much resembles *Pye v. Faxon*, 156 Mass. 471. The plaintiff in that case, being the tenant of a house, sued the owner of an adjoining lot for trespasses alleged to have been committed upon the plaintiff's estate by the defendant while engaged in constructing a large building on his lot. It appeared from the testimony that the wall next to the plaintiff's house was not built on the boundary line, but was several inches from it, and that the staging used in building it was placed upon the inside; that the brick when laid pressed out the mortar, which was then scraped off by the trowels of the masons, and some of it dropped upon the plaintiff's land, upon her rear windows, and upon the clothes hanging in her back yard. At the trial the presiding judge instructed the jury that if the dropping of the mortar was from the carelessness of the workman the defendant was not liable, but if it was something necessarily involved in the building of the wall, then he might be liable; and these instructions were held to be correct.

This is not a case where the work, even if properly done, creates a peril, unless guarded against, as in the cases relied upon by the plaintiff. The accident was caused by the act of the contractor in doing what it was not necessary for him to do, what he was not expected to do, and what he did not intend to do. If it had been necessary for him to topple the chimney over into the street, or to remove the bricks by letting them fall into it, or the contract had contemplated such action, the instructions would not have been objectionable; but as this was not necessary or intended, the work could not be classed as work which, if properly done, was ordinarily attended with danger to the public.

The negligence, if any, was in a mere detail of the work. The con-

tract did not contemplate such negligence, and the negligent party is the only one to be held. The case is clearly distinguishable from *Woodman v. Metropolitan Railroad*, *ubi supra*, and others of a like character, and must be classed with *Connors v. Hennessey*, *ubi supra*, and others like it.

The exclusion of the questions with reference to the prior ailments of the plaintiff was within the discretion of the court. The physician who had treated her for them testified that he did not think there was any reason to believe that they were in any way connected with her condition after the accident; and although, as stated by the counsel for the defendant, that might not be the opinion of another physician who was present at the suggestion of the defendant, to hear the evidence, and, although in accordance with experience in such matters very likely it would not be, still the court may have concluded that he could not assume this contradiction in the expert testimony until it actually occurred, and that upon the evidence before him he was justified in looking at the prior ailments as in no way connected with her condition at the trial, and therefore immaterial. It does not appear that in this there was error.

*Exceptions sustained.*¹

CROWN v. ORR.

Court of Appeals of New York, December, 1893. 140 N. Y. 450.

THE plaintiff, an infant suing by guardian, sought to recover damages for bodily injuries sustained by him by reason of the defendants' alleged negligence. The plaintiff was at the time engaged in the service of the defendants, and was nineteen years old. Further facts appear in the opinion of the court. This was an appeal from a judgment of the General Term, affirming a verdict and judgment for the plaintiff, after refusal of a motion for a new trial.

O'BRIEN, J. The relation of master and servant existed between the plaintiff and the defendants at the time that the former received the personal injury for which he has recovered damages. The question presented is whether, upon any view of the evidence, the result can be attributed to any fault or neglect on the part of the master. The rules of law in such cases are well settled, but it is not always easy to apply them to the varying facts in each particular case. The master does not insure the servant against all accidents and mishaps that may befall him in the business. The servant, when he enters into the relation, assumes not only all the risks incident to such employment, but all dangers which are obvious and apparent. The law im-

¹ See *Bigelow on Torts*, 8th ed. ch. III, § 11.

poses upon him the duty of self-protection, and always assumes that this instinct, so deeply rooted in human nature, will guard him against all risks and dangers incident to the employment or arising in the course of the business of which he has knowledge or the means of knowledge. If he voluntarily enters into or continues in the service without objection or complaint, having knowledge or the means of knowing the dangers involved, he is deemed to assume the risk and to waive any claim for damages against the master in case of personal injury to him. *Thompson on Neg.*, p. 1608; *Haskin v. N. Y. C. & H. R. R. Co.*, 65 Barb. 129; *affid.*, 56 N. Y. 608; *Jones v. Roach*, 9 J. & S. 240.

This principle applies to the plaintiff, though he was not at the time of full age. Like any other servant he took upon himself the ordinary risks of the service, and all dangers from the use of machinery which were known to him, or obvious to persons of ordinary intelligence. *De Graffe v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 125; *King v. B. & W. R. R. Co.*, 9 Cush. 112. He is bound to take notice of the ordinary operation of familiar laws, and to govern himself accordingly, and if he fails to do so, the risk is his own. He is bound to use his eyes to see that which is open and apparent to any person so using them, and if he neglects to do so he cannot charge the consequences upon the master.

The liability of the master for injuries to the servant received in the service is based upon his personal negligence, and the evidence must establish some personal fault or neglect of duty on his part, or what is equivalent thereto, in order to justify a verdict, and he is entitled to the presumption that he has performed this duty until the contrary is made to appear. *Wood on Master & Servant*, §§ 345, 346; *Cahill v. Hilton*, 106 N. Y. 517. If the injury to the servant is attributable to the master's neglect in omitting to furnish safe and adequate appliances for the work, according to the nature of the business, or competent co-servants, or even if he neglects to give persons unacquainted with the use of machinery proper instructions with respect to its use, he is liable. It remains only to apply these principles to the facts of this case as disclosed by the testimony of the plaintiff himself. On the 10th of December, 1890, the plaintiff, who was then about nineteen years of age, and in the employment of the defendants, lost his hand and part of the arm by coming in contact with the knives of a planing machine. No complaint was made that the machine was in any respect defective or unsuitable for the purpose for which it was used, or that the place where the plaintiff was directed to work was in any respect unsafe. The only omission of duty charged against the master in the complaint, or at least the only fault now urged, is that the plaintiff was ignorant of the use of machinery, and the defendants neglected to give proper instructions to him in this regard, or cause them to be given.

When the accident occurred, the plaintiff had been at work in the shop about three weeks. His duty was to stand in front of the machine, and about four or five feet from the end of it, and take off the dressed lumber after it had passed through the planer, and when moved to where he stood by the action of the machine and the use of a small roller and horse attached. He was not required to operate or handle the machine itself, but was cautioned against meddling with its operation. There were four of these machines in the room, under charge of a man who assigned the plaintiff to one of them to take the boards away and load them upon a truck as they were dressed. The plaintiff testifies that on the day of the accident the man in charge ordered him to place a hood made of tin, and used to divert the shavings and dust from the machine to the floor under the frame, in its place in front of the knives of the planer. This hood had a hook at the top, and when in use hung in front of the knives and about eight inches from them, upon a small beam under the frame. He says that while attempting to put it in place his hand was caught by the knives, and in this way the injury was sustained. At this point there is a marked conflict in the evidence. The plaintiff says that he was directed by the man in charge to put the hood in place without giving him any instructions as to the manner of doing it, or the danger incident to such an operation. The foreman of the machines in charge admits that he gave him no instructions in this respect, for the simple reason that no such duty was ever required of him, and, in fact, he gave him no order to that effect on this occasion, but the act was entirely voluntary on the part of the plaintiff, and without request or direction from any one. The plaintiff says that when his hand came in contact with the knives, the hood dropped from the hand upon the floor, and that he never succeeded in hanging it. On the other hand, the foreman, and in this he is corroborated by several other witnesses who were working in the shop at the time, says that after the injury the hood was found hanging in front of the knives, not upon the beam where it was always placed, but upon another, some four inches nearer to the knives. Assuming that the verdict has determined conclusively that the foreman ordered the plaintiff to hang this hood in place, in front of the knives of the planer, does this charge the master with personal negligence? The plaintiff had been at work in front of his machine for three weeks, and during that time had full opportunity to observe the manner of handling this hood and placing it upon the machine. He had the same opportunity of informing himself with respect to any danger attending such an act as the master had. There was nothing in the operation which he was required to perform that called for any special instructions, and he asked for none. It was not negligence to direct a young man nineteen years of age, who had seen the machine in operation for three weeks, to perform such duty, even without in-

structions, especially when he asked for none and gave no sign that he was not entirely familiar with the method by which the order could be properly obeyed. This was one of the risks which he assumed when he entered the defendants' service. But if, as the learned counsel for the plaintiff claims, the operation was specially dangerous in the absence of instructions, then the danger was obvious, and he was not bound to obey the order; but if he did, the risk was his own. The learned trial judge instructed the jury with respect to the law upon this point in the following language: "Now, there are some dangers, gentlemen, of which a person does not need to be informed. Where there is a knife or a saw, the danger is palpable to any one who is employed to work, that if he gets before that knife or saw, he will be cut or hurt. . . . Against apparent dangers a master need not warn a servant. . . . Now, here this boy unquestionably knew that there were knives in this machine that planed this board and cut grooves or tongues on either side; that was as plain to his understanding as it is to yours, and it was as clear to him when he was put at this employment as it is to us to-day, after this trial. He knew that if his fingers got within the range of those knives that the same power that caused those knives to revolve and cut off with great rapidity the coating of these boards and make them smooth, would injure his fingers. Instruction was not necessary to impart that information."

This is a clear exposition of the law applicable to such questions, but we think its application to the proofs in this case called for a non-suit or the direction of a verdict for the defendants. There is no conflict in the evidence as to the particular duties which the plaintiff was hired to perform. They consisted, as already stated, in removing the dressed boards from the machine as they came through, and occasionally sweeping the floor. It is admitted that proper instructions were given him to perform this work with safety, and if it be true, as the plaintiff testifies, that on the occasion in question he was directed to perform another, and specially dangerous service, without sufficient instruction, the fault was not that of the master, but of a co-servant. So that whether we consider the order to hang the hood as an incident of the employment the risks of which the plaintiff assumed, or a direction to do a reckless or dangerous thing without sufficient knowledge or instruction, the dangers of which were plain and obvious, or a request by the foreman to do something that by the employment he was not bound to do, the result is the same. The plaintiff was, no doubt, very seriously injured, and his case was one which appealed to the sympathy of the jury, although the testimony preponderated strongly in favor of the conclusion that the injury was the result of some carelessness or inattention on his part. But it would be manifestly unjust to subject the master to damages in such a case where, under the most favorable view that can be taken of the

evidence in favor of the plaintiff, the injury was the result of an accident which could not have been anticipated or prevented by the exercise of ordinary care, and which occurred without the fault of the master.

The judgment should, therefore, be reversed, and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

FARWELL v. THE BOSTON AND WORCESTER RAILROAD CORPORATION.

Supreme Court of Massachusetts, March, 1849. 4 Met. 49.

IN an action of trespass upon the case, the plaintiff alleged in his declaration that he agreed with the defendants to serve them in the employment of an engineer in the management and care of their engines and cars running on their railroad between Boston and Worcester, and entered on said employment, and continued to perform his duties as engineer till October 30, 1837, when the defendants, at Newton, by their servants, so carelessly, negligently, and unskilfully managed and used, and put and placed the iron match rail, called the short switch, across the rail or track of their said railroad, that the engine and cars, upon which the plaintiff was engaged and employed in the discharge of his said duties of engineer, were thrown from the track of said railroad, and the plaintiff, by means thereof, was thrown with great violence upon the ground; by means of which one of the wheels of one of said cars passed over the right hand of the plaintiff, crushing and destroying the same.

The case was submitted to the court on the following facts agreed by the parties: "The plaintiff was employed by the defendants, in 1835, as an engineer, and went at first with the merchandise cars, and afterwards with the passenger cars, and so continued till October 30, 1837, at the wages of two dollars per day, that being the usual wages paid to engine-men, which are higher than the wages paid to a machinist, in which capacity the plaintiff formerly was employed.

"On the 30th of October, 1837, the plaintiff, then being in the employment of the defendants, as such engine-man, and running the passenger train, ran his engine off at a switch on the road, which had been left in a wrong condition (as alleged by the plaintiff, and, for the purposes of this trial, admitted by the defendants) by one Whitcomb, another servant of the defendants, who had been long in their employment, as a switchman or tender, and had the care of switches on the road, and was a careful and trustworthy servant, in his general

character, and as such servant was well known to the plaintiff; by which running off the plaintiff sustained the injury complained of in his declaration.

“The said Farwell (the plaintiff) and Whitcomb were both appointed by the superintendent of the road, who was in the habit of passing over the same very frequently in the cars, and often rode on the engine.

“If the court shall be of opinion that, as matter of law, the defendants are not liable to the plaintiff, he being a servant of the corporation, and in their employment, for the injury he may have received from the negligence of said Whitcomb, another servant of the corporation, and in their employment, then the plaintiff shall become nonsuit; but if the court shall be of opinion, as matter of law, that the defendants may be liable in this case, then the case shall be submitted to a jury upon the facts which may be proved in the case; the defendants alleging negligence on the part of the plaintiff.”

SHAW, C. J. This is an action of new impression in our courts, and involves a principle of great importance. It presents a case where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose, — that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties, and the labor and skill required for their proper performance. The question is whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer. It is an argument against such an action, though certainly not a decisive one, that no such action has before been maintained.

It is laid down by Blackstone, that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise the servant shall answer for his own misbehavior. 1 Bl. Com. 431; *M'Manus v. Crickett*, 1 East, 106. This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master that the latter shall be answerable civiliter. But this presupposes that the parties stand to each other in the relation of stran-

gers, between whom there is no privity; and the action, in such case, is an action sounding in tort. The form is trespass on the case, for the consequential damage. The maxim respondeat superior is adopted in that case from general considerations of policy and security.

But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated.

The same view seems to have been taken by the learned counsel for the plaintiff in the argument; and it was conceded that the claim could not be placed on the principle indicated by the maxim respondeat superior, which binds the master to indemnify a stranger for the damage caused by the careless, negligent, or unskilful act of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties, applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant. It would be an implied promise, arising from the duty of the master to be responsible to each person employed by him, in the conduct of every branch of business, where two or more persons are employed, to pay for all damage occasioned by the negligence of every other person employed in the same service. If such a duty were established by law, — like that of a common carrier, to stand to all losses of goods not caused by the act of God or of a public enemy, or that of an innkeeper, to be responsible, in like manner, for the baggage of his guests, — it would be a rule of frequent and familiar occurrence; and its existence and application, with all its qualifications and restrictions, would be settled by judicial precedents. But we are of opinion that no such rule has been established, and the authorities, as far as they go, are opposed to the principle. *Priestley v. Fowler*, 3 Mees. & Welsb. 1; *Murray v. South Carolina Railroad Company*, 1 McMullan, 385.

The general rule resulting from considerations as well of justice as of policy is that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the

rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes; but whether he is responsible, in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents. It seems to be now well settled, whatever might have been thought formerly, that underwriters cannot excuse themselves from payment of a loss by one of the perils insured against, on the ground that the loss was caused by the negligence or unskillfulness of the officers or crew of the vessel, in the performance of their various duties as navigators, although employed and paid by the owners, and, in the navigation of the vessel, their agents. *Copeland v. New England Marine Ins. Co.*, 2 Met. 440-443, and cases there cited. I am aware that the maritime law has its own rules and analogies, and that we cannot always safely rely upon them in applying them to other branches of law. But the rule in question seems to be a good authority for the point that persons are not to be responsible, in all cases, for the negligence of those employed by them.

If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances. To take the well-known and familiar cases already cited: a common carrier, without regard to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers, and because, in case of actual loss, it would be extremely difficult for the owner to adduce proof of embezzlement, or other actual fault or neglect on the part of the carrier, although it may have been the real cause of the loss. The risk is therefore thrown upon the carrier; and he receives, in the form of payment for the carriage, a premium for the risk which he thus assumes. So of an innkeeper; he can best secure the attendance of honest and faithful servants, and guard his house against thieves. Whereas, if he were responsible only upon proof of actual negligence, he might connive at the presence of dishonest inmates and retainers, and even participate in the embezzlement of the property of the guests, during the hours of their necessary sleep, and yet it would be difficult, and often impossible, to prove these facts.

The liability of passenger carriers is founded on similar considera-

tions. They are held to the strictest responsibility for care, vigilance, and skill, on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Story on Bailments, §590 et seq.

We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrong-doer.

In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment; and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances, the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and, like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default, of which we give no opinion.

It was strongly pressed in the argument that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security, yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a

distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability when it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers for the negligence of a servant.

A case may be put for the purpose of illustrating this distinction. Suppose the road had been owned by one set of proprietors whose duty it was to keep it in repair, and have it at all times ready and in fit condition for the running of engines and cars, taking a toll, and that the engines and cars were owned by another set of proprietors, paying toll to the proprietors of the road, and receiving compensation from passengers for their carriage; and suppose the engineer to suffer a loss from the negligence of the switch-tender. We are inclined to the opinion that the engineer might have a remedy against the railroad corporation; and, if so, it must be on the ground that as between the engineer employed by the proprietors of the engines and cars, and the switch-tender employed by the corporation, the engineer would be a stranger, between whom and the corporation there could be no privity of contract, and not because the engineer would have no means of controlling the conduct of the switch-tender. The responsibility which one is under for the negligence of his servant, in the conduct of his business, towards third persons, is founded on another and distinct principle from that of implied contract, and stands on its own reasons

of policy. The same reasons of policy, we think, limit this responsibility to the case of strangers, for whose security alone it is established. Like considerations of policy and general expediency forbid the extension of the principle, so far as to warrant a servant in maintaining an action against his employer for an indemnity which we think was not contemplated in the nature and terms of the employment, and which, if established, would not conduce to the general good.

In coming to the conclusion that the plaintiff, in the present case, is not entitled to recover, considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears that no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam-engine; whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent in case of an incorporated company — are questions on which we give no opinion. In the present case the claim of the plaintiff is not put on the ground that the defendants did not furnish a sufficient engine, a proper railroad track, a well-constructed switch, and a person of suitable skill and experience to attend it; the gravamen of the complaint is that that person was chargeable with negligence in not changing the switch, in the particular instance, by means of which the accident occurred by which the plaintiff sustained a severe loss.

It ought, perhaps, to be stated, in justice to the person to whom this negligence is imputed, that the fact is strenuously denied by the defendants, and has not been tried by the jury. By consent of the parties, this fact was assumed without trial, in order to take the opinion of the whole court upon the question of law, whether, if such was the fact, the defendants, under the circumstances, were liable. Upon this question, supposing the accident to have occurred, and the loss to have been caused, by the negligence of the person employed to attend to and change the switch, in his not doing so in the particular case, the court are of opinion that it is a loss for which the defendants are not liable, and that the action cannot be maintained.

*Plaintiff nonsuit.*¹

¹ See Rev. Laws of Mass., ch. 106, §§ 71 et seq.

CONSOLIDATED COAL COMPANY *v.* HAENNI.

Supreme Court of Illinois, October, 1893. 146 Ill. 614.

ACTION for negligence, whereby the plaintiff received bodily injuries. These were sustained in the raising an iron cylinder smoke-stack 35 feet long and weighing 3800 pounds, in the defendant's mine No. 9. The plaintiff was a blacksmith employed in defendant's mine No. 10, of which one Weissenborn was "pit boss," one Balke "top boss," and one Hansinger "boss carpenter." One Hebenstreit was superintendent of the two mines. The smoke-stack to be raised in mine No. 9 was an eighth of a mile from the plaintiff's blacksmith shop in mine No. 10; and the plaintiff was ordered by Weissenborn to go there and help in the raising, which he did. While the plaintiff, under the orders of Hebenstreit, was pulling upon the steadying-rope, the stack, now in the air, slipped in the rope holding it, became disengaged from its supports, and fell, cutting off the plaintiff's leg in the course of its fall. All the above-named men of the defendant were directing the work at the time. Objection was made by the defendant to certain instructions given to the jury, the nature of which appears in the opinion of the court.

Verdict for the plaintiff, and special findings, that the defendant was negligent in the matter, first by removing the plaintiff from his professional job, and secondly, by improper arrangements for raising the smoke-stack. Judgment accordingly, which was affirmed by the Appellate Court.

MAGRUDER, J. Objections are made to the two instructions given to the jury on behalf of the plaintiff. The first instruction lays down, as one of the conditions to a right of recovery, that the jury shall "believe from the greater weight of the evidence that the plaintiff was employed by the defendant as blacksmith, and that, while so employed, Weissenborn, or some other officer or agent of the defendant, having authority, ordered and directed the plaintiff to assist in hoisting and putting in place a smoke-stack to the furnace connected with the coal mine operated by defendant, and . . . that hoisting and putting in place a smoke-stack was no part of the work which plaintiff had contracted to perform for the defendant." In regard to this portion of the instruction, counsel for appellant says: "The instruction proceeds upon the supposition that there was evidence tending to show that the work appellee was engaged in was not within the scope of his duty; there was no such evidence." The appellant is not in a position to make the objection thus urged, inasmuch as it asked the court to give and the court did give in its behalf an instruction, of which the following is the first paragraph: "The court instructs the jury that,

in order to recover in this case, the plaintiff must have proved by a preponderance of the evidence, not only that it was not within the scope of his employment to be assisting at the work he was engaged in at the time of his injury, but also that some servant of defendant was guilty of some act of negligence which caused plaintiff's injury." We do not deem it necessary to enter into a discussion of the evidence, if the record were in such shape as to justify us in doing so, in order to determine whether the proof does or does not tend to show that raising the smoke-stack was not within the scope of plaintiff's duties as blacksmith. If plaintiff's instruction is wrong in the respect indicated, the defendant's instruction is chargeable with the same fault. The latter instruction leaves it to the jury to find from the preponderance of the evidence the existence of a fact, which is now claimed to be unsupported by any testimony at all.

The defendant has no right to complain of error in an instruction given for the plaintiff, when like error appears in an instruction given at the defendant's request. *Clemson v. State Bank of Illinois*, 1 Scam. 45; *Pierce v. Millay*, 62 Ill. 133; *Northern L. Packet Co. v. Binninger*, 70 Id. 571; *Calumet Iron and Steel Co. v. Martin*, 115 Id. 358; *Ochs v. The People*, 124 Id. 399; *I. C. R. R. Co. v. Latimer*, 128 Id. 163; *L. E. & W. R. R. Co. v. Middleton*, 142 Id. 550. This doctrine was thus succinctly stated in *Ochs v. The People*, *supra*, in the following words: "Surely, it is not for the plaintiffs in error to complain of an instruction when they ask one of the same kind themselves." *Chapman v. Barnes*, 29 App. Ct. Rep. 184.

The first instruction also predicates plaintiff's right to a recovery upon the belief by the jury "from the greater weight of the evidence," "that hoisting and putting in place a smoke-stack in the way the smoke-stack in question was being hoisted and put in place, if such was shown from the evidence, was extra-hazardous." Counsel makes the following objection to this part of the instruction: "It supposes that there was evidence that the work was extra-hazardous, when there was no evidence except the accident itself."

When a servant enters into a contract of hiring with the master, he assumes all the risks ordinarily incident to the employment, and is presumed to have contracted with reference to such risks (*Wood's Law of Master and Servant*, § 326). But where a servant is ordered by the master to do work outside of his regular employment, and which is different in character from that embraced in his regular contract of hiring, and brings him into association with a different class of employees, he does not, by obeying such orders, necessarily thereby assume the risks or hazards incident to the new work. *The Pitts., Cin. and St. L. Ry. Co. v. Adams*, 105 Ind. 151. The hazards incident to the new work may be considered extra-hazardous as being outside of the regular employment, and additional to the risks thereof. As the instructions of both parties left it to the jury to determine

whether or not the hoisting of the smoke-stack was outside of plaintiff's duties as a blacksmith, their decision of this question in the affirmative would necessarily involve a finding on their part that the hazards of the additional work were extra.

The evidence tends to show, that the tackle and ropes and blocks were so carelessly and negligently adjusted as to cause the smoke-stack to slip, and the rope to become detached from the hook at the top of the guy-pole. The slipping of the rope from the hook was due either to such careless adjustment, or to the failure to place upon the hook some protection which would keep the rope in its place. In other words, the proof tends to show, that the accident occurred, either because of the carelessness and incompetency of those who arranged the hoisting apparatus and fixed it and placed it in position, or because of defects in the apparatus itself. Among the risks incident to the business, which the servant is understood to take upon himself by the contract of hiring, are those arising from the careless or wrongful acts of fellow-servants (Wood's Law of Master & Servant § 427). But the assumption by the servant of risks resulting from the negligence of his fellow-servants is subject to the implied undertaking of the master, that he will use all reasonable care to furnish safe premises, machinery and appliances, and to employ competent and prudent co-employees. *P. C. & St. L. Co. Ry. v. Adams*, supra; Wood's Law of Master & Servant §§329 and 416. When the master fails to furnish suitable machinery and to see that it is properly protected, or to employ careful and prudent servants to manage and operate such machinery, the risks resulting from such failure are extra-hazardous, and such extra hazards are not among the risks which the employee assumes as a part of his contract of service. *U. S. Rolling Stock Co. v. Wilder*, 116 Ill. 100. Hence, we do not think that the instruction was erroneous in directing the attention of the jury to the question, whether or not the work of hoisting the smoke-stack, by means of the apparatus used for that purpose, was extra-hazardous.

The instruction further predicates the right of recovery upon the belief of the jury from the greater weight of the evidence, that plaintiff was inexperienced, and did not have the requisite skill or knowledge to perform the work of hoisting and putting in place the smoke-stack, and did not see or know the dangers and risks of the work, and, by the exercise of ordinary observation and diligence under all the facts and circumstances surrounding him at the time so far as shown by the evidence, would not have seen or known such dangers and risks; and that his want of knowledge or skill, if shown by the proof, was known to the defendant, or would have been known by the exercise of ordinary diligence; and that the defendant did not give him notice or warning of the danger of hoisting and putting in place the smoke-stack, if such danger is shown by the evidence; and

that Weissenborn (the pit boss of mine No. 10) was superior in authority to plaintiff, and it was the latter's duty to obey the orders and directions of Weissenborn if the evidence shows that such orders were given; and that it was within the scope of Weissenborn's authority to put said smoke-stack in place; and that, while plaintiff was engaged in hoisting, etc., he exercised ordinary care and caution for his own safety, and was injured as alleged in the declaration; and that the injury was caused by the negligence of the defendant, etc., and was the direct result of the authority of Weissenborn over plaintiff. Counsel for appellant objects to this portion of the instruction, because, he says, it assumes that the work done by plaintiff required skill and experience, whereas the plaintiff did nothing but pull, with others, on one of the ropes, and was therefore doing what required no skill or experience; and because of the assumption alleged to be embodied in the instruction, that there was some danger, and that the defendant knew of the danger, and was under obligations to give plaintiff notice of it; and because of the alleged absence of any negligence on the part of the defendant either in the matter of hoisting the smoke-stack, or in ordering plaintiff to assist in doing so.

The testimony tends to show, that plaintiff was employed by the company to do the work of a blacksmith, and had never before helped to raise a smoke-stack either by means of the apparatus employed by the defendant when the injury occurred, or otherwise. The evidence also tends to show, that plaintiff was called suddenly from his shop to assist in hoisting the stack, and that all the arrangements for effecting such hoisting were completed when he arrived upon the ground, so that he had no opportunity to observe or inspect them.

We are not prepared to say that the raising of an immense iron smoke-stack, weighing 3800 pounds, and placing it in position upon a base prepared for it, is not an operation which requires some experience and "skill or knowledge." The instruction properly leaves it to the jury to determine from the evidence, whether or not the hoisting of the stack in the mode adopted "required peculiar skill or knowledge to perform it with safety." While it may be true, that the mere pulling on a rope does not require any skill, yet it may require skill or knowledge to calculate and understand the effect of such exertion upon the apparatus with which the rope is connected, and upon the action of such apparatus in properly lifting the weight attached to it.

The material question, which was and should have been presented to the jury, was, whether the plaintiff, under all the circumstances, had sufficient experience or knowledge to understand the hazards of the extra work which he was required to perform. The instruction cannot be said to assume that there was danger connected with the hoisting, as it uses the qualifying words, "if any such danger is shown by the evidence." Where a servant is temporarily engaged in

more hazardous work than that for which he was employed, he takes upon himself all such risks incident to the work, as are equally open to the observation of himself and the master. 2 Thompson on Neg., page 976, § 7. It is when the servant works with defective machinery, knowing it to be defective or dangerous, that he assumes the risks incident to its use. "Not only the defects, but the dangers, must be known to him." Wood's Law of Master & Servant, §§ 372, 376; Pierce on Railroads, pages 378, 379. As to the master's knowledge, he cannot screen himself from liability upon the ground that he did not know of the defects in his machinery, or of the incompetency of his servants, if he might have known of them by the exercise of due care. Wood's Law of Master & Servant, §§ 330, 347. It has been held, that the master or foreman placed in charge of and conducting a manufacturing business will be presumed to know and be familiar with the dangers, latent and patent, ordinarily accompanying the business. *Smith v. Peninsular Car Works*, 50 Mich. 501. We see no reason why the same presumption of familiarity with latent and patent dangers should not exist, where a master or superintendent is placed in charge of, and authorized to use, such a hoisting apparatus as is described in this record. The law will imply and infer notice of any defect which, by the use of ordinary care, might have been known to the master. *Goff v. T. St. L. & K. C. R. R. Co.*, 28 App. Ct. Rep. 529.

As to the master's duty to give notice, the law is that, if there are latent defects or hazards incident to an occupation, of which the master knows or ought to know, and which the servant, from ignorance or inexperience, is not capable of understanding and appreciating, it is the master's duty to warn or inform the servant of them. *Smith v. Peninsular Car Works*, supra; Wood's Law of Master & Servant, § 349; *Lalor v. C. B. & Q. R. R. Co.*, 52 Ill. 401; *Consolidated Coal Co. v. Wombacher*, 134 Id. 57.

The question of negligence was submitted to the jury by the first instruction given for the defendant as above quoted, and, therefore, the defendant is estopped from now claiming that there was no proof of negligence. Where the master orders the servant into a service which he did not undertake to perform, and while in such service the servant is injured, the question of negligence must depend upon the facts and circumstances of each case. 14 Am. and Eng. Enc. of Law, page 861. The question whether certain special service outside of the contract can be reasonably required of the servant, depending as it does upon the contract, and the character of the service, and the necessities of the master, must be left to the jury to determine. Wood's Law of Master & Servant, § 89. We do not think that the objections urged should be sustained.

It appears, that at the close of plaintiff's case, the court excluded from the jury certain evidence in regard to putting up the smoke-

stack after the occurrence of the injury. Counsel for appellant urges, that the language of the plaintiff's first instruction was broad enough to authorize the jury to consider this excluded evidence. We do not think that the instructions, in requiring the jury to base their findings upon the evidence, can be construed as referring to any other evidence than that which was not excluded. If such objection in this case can be properly urged against the instructions asked by and given for one party, it can with equal propriety be made to those asked by and given for the other party. Where a jury is required to believe certain facts from the evidence, it has always been understood that the reference is to the evidence which is not ruled out by the court, and which is therefore rightfully in the case.

Judgment affirmed.

TOY v. UNITED STATES CARTRIDGE COMPANY.

Supreme Court of Massachusetts, March, 1893. 159 Mass. 313.

TORT, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the breaking of a punch in a cartridge machine which she was operating. Trial in the Superior Court, before Hopkins, J., who, at the defendant's request, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

MORTON, J. There is no doubt that there was evidence for the jury on the question of the plaintiff's due care. Indeed, the defendant does not argue that there was not. The real question is whether there was any evidence of negligence on the part of the defendant. It was the duty of the defendant, in the exercise of reasonable care, to see that the machine on which the plaintiff was set to work was in a safe condition, and was suitable for the purpose for which it was used. This obligation applied to all its parts. The punch formed a part of it. *Rice v. King Philip Mills*, 144 Mass. 229. It was fitted to and inserted in it, was necessary to its use, and was furnished by the defendant for use in it, and as a part of it. A machine may be so constructed, and its operation may be such, as to call for a frequent replacement of one or more of its constituent parts. Such parts when adjusted in the machine become as much a part of it as if included in the original construction, and a defect in one of them is a defect in the machine. The duty of seeing that such parts are not defective is one incumbent on the master. It is not a matter of ordinary repair from day to day, which may be intrusted to a servant. The defendant could not therefore avoid responsibility by delegating this duty to persons whom it believed to be competent, and who were in fact com-

petent to perform it. If the injury to the plaintiff was due to a defect in the punch, which might have been discovered by the exercise of reasonable care on their part, but was not, the defendant is liable for their negligence. *Moynihan v. Hills Co.*, 146 Mass. 586, 592, and cases cited.

The plaintiff testified that she was required to examine the cartridge shells from time to time to see if they were scratching; and that on the day of the accident she found that they were scratching, and informed the foreman of it, and he sent for one McFarland, the second hand, to look after the machine. McFarland took out the dies and punch and put in new dies and a new punch, and then told the plaintiff to start the machine by a signal, which she did. The first time the punch went down through the plate and dies all right, there being no shell; but the second time it broke and caused the injury complained of. The plaintiff further testified that before she started the machine she saw a small black mark extending half-way round the punch about in the middle of the punch; and in further description of it said "that she did not know what this black mark meant, but that it looked like a knitting needle that had gone rusty and black." There was also testimony tending to show that the punch broke in the middle, and some of the witnesses said that they never knew before of a punch breaking in the middle, but that they usually bent or broke at the point. It also appeared that after the accident the broken punch was examined by the foreman and McFarland; that the former passed it to one Dimon, who was the defendant's agent and superintendent, and who examined it and passed it back to the foreman, who threw it away; and that the only other person who appeared to have seen it was a woman who worked on a machine near the plaintiff, and who testified that she "could see that it [the punch] was broken in one place in the middle," but that "she did not know what the condition of the broken surfaces was, as the foreman sent her to her work." We think it would have been competent on this evidence for the jury to find that there was a defect in the punch in the middle, and that the break in the middle was due to it. It is true that the foreman and McFarland, who were called as witnesses by the defendant, testified that they saw nothing the matter with the punch, and that Dimon, who was called by the plaintiff, testified that, though he found on examining it with a microscope there was a flaw in it, the flaw did not extend to the outside, and that he did not think it was possible to have discovered the defect which he saw on the inside of the punch, and that, in his judgment, the flaw which he found was not sufficient to have caused the defect. He also testified that bad punches were usually thrown away. But the weight to be given to all this evidence was clearly for the jury. We cannot say that there was no evidence of a defect in the punch, or that, if there was one, there was no evidence that the accident was not caused by it.

It was also a question for the jury, under all the circumstances, whether the failure to discover the defect, if there was one, was due to negligence on the part of the defendant, or of those charged by it with the duty of making and examining the punches. The material from which and the manner in which the punches were made, and the system of inspection adopted by the defendant, were all before the jury, and it was for them to say whether they were all that reasonable care required, or whether a more careful inspection should have been made, and whether, if it had been made, the defect would have been discovered. There was testimony that, if there was a crack on the outside, it might be filled up in polishing or in turning down the punch. It was for the jury to say also whether the defect, if there was one, was such that failure to discover it afforded evidence of negligence on the part of the person or persons charged with the duty of making or inspecting the punch.

The testimony as to what Dimon said at the former trial was rightly excluded on the ground on which it was evidently offered.¹ *Richstain v. Washington Mills*, 157 Mass. 538.

A majority of the court is of opinion that the entry must be,
Exceptions sustained.

McPHEE v. SCULLY.

Supreme Court of Massachusetts, March, 1895. 163 Mass. 216.

TORT, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by having his hand crushed in a pile-driver. The declaration contained two counts, the first of which was at common law, and the other under the employers' liability act, St. 1887, c. 270.² At the trial, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

BARKER, J. The defendant contends that the verdict against him should be set aside; first, because the evidence does not sustain the burden of showing that the plaintiff was in the exercise of due care; secondly, because the plaintiff ought to be held to have assumed the risk; thirdly, that the accident happened through the negligence of a fellow servant; and fourthly, that, if the evidence shows a cause of action, the proof does not support the allegations of the declaration.

The work was driving piles. The plaintiff was one of a gang of seven men, of whom one Fahey was foreman. At the time of the accident the plaintiff was aloft standing on a joist, swinging and steadying a suspended pile, to put it in position. This work was to

¹ Dimon, who was called as a witness by the defendant at the former trial, testified, on cross-examination, that the flaw in the punch might have extended to the outside, and that it might have been discovered.

² Rev. Laws, c. 106, §§ 71-79.

be done by applying his strength directly to the pile, and he put his left hand on top of the pile and his right arm between the pile and one of the upright beams between which the pile stood. The driving-hammer was five feet above him, upheld by a chocking-block on which it rested while the piles were placed in position. The placing of his hand upon the top of the pile, directly in the line of descent of the hammer if it should fall, is the act which the defendant contends should charge the plaintiff with contributory negligence. But the fall of the hammer while the plaintiff was at his post was not to be expected; and if it should occur, there was no position in which he could do his work of which safety could be predicated. He had a right to expect that the hammer would not fall, and the jury might find that he was in the exercise of ordinary care.

Whether he had assumed the risk of injury from the accidental fall of the driving-hammer is a different question. It was obvious that, if it should fall while he was at work aloft, his serious injury would be an almost inevitable result. It was also obvious that the hammer would fall if the chocking-block or its supports were defective, or if the block should be accidentally or intentionally displaced. He consented to work exposed to this danger of injury by the fall of the hammer as the machine was constructed, and he also consented to work exposed to this danger, so far as it might be caused by the carelessness of his fellow workmen. There was no evidence from which it could be found that the pile-driver or any of its appliances were out of repair or defective; and the immediate cause of the unexpected fall of the hammer was the accidental pulling away of the chocking-block by the strain of the gypsy fall, which a drunken fellow workman, who had the fall in hand, negligently allowed to get over the block in such a way that when made taut it pulled the block out from under the hammer. The end of the chocking-block projected some three inches beyond the outer face of the upright beam against which it stood when in place under the hammer, and it was obvious that the gypsy fall might get over the projecting end, and that, if the fall should be straightened when attached to a pile and over the projecting end of the chocking-block, the block might be pulled from its place and the hammer released. These obvious risks the plaintiff must be taken to have understood and to have assumed. But this is not conclusive against his right to have compensation for his injury, if upon the evidence there was, back of the dangers of which he assumed the risk, some breach of duty towards him on the part of his employer which could fairly be found to have been the cause of the accident. Such breaches of duty are charged in each count of the declaration. In the first count, the employing of careless, incompetent, and reckless fellow workmen, whose carelessness, incompetency, and recklessness were known, or might with reasonable care and diligence have been known, to the defendant, — a breach of duty at

common law. In the second count, negligence of a person in the defendant's service, intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence, — a breach of duty imputed to the employer by force of the St. 1887, c. 270.¹ The evidence justified a finding that the foreman and the workman who got the fall foul of the chocking-block were drunk, and others of the men had been drinking at their work, from a bottle of liquor for which the foreman had sent one of the men. The foreman had been working for the defendant eight or nine years, and the defendant testified that he never saw him intoxicated at his work before the accident; that he had seen him intoxicated a good many times, but not at his work; that he never saw him under the influence of liquor at his work; that he never saw him at the work but that he was able to do his work right; and that ever since he knew him the foreman's habits had been as he described. But one of the men gave evidence from which the jury might find that the foreman had before this occasion drank liquor, and been intoxicated at his work when the defendant was present, and the defendant's general superintendent testified that he had seen the foreman a number of times under the influence of liquor, perhaps half a dozen, and did not state that these were not times when the foreman was at his work; and another workman testified that on a previous occasion the foreman had been under the influence of liquor, and compelled to go home at noon. This evidence would justify the jury in finding that the foreman was an incompetent and reckless man, whom the defendant had employed either knowing his faults or chargeable with knowledge of them. The evidence also tended to show, not only that the foreman and the workman who handled the fall were drunk at the time of the accident, but that the appearance of the latter showed him to be drunk. The fouling of the chocking-block by the fall was plainly to be seen, and the order to "hoist again," which caused the straightening of the fall and the displacement of the guard, was given by the foreman. Either leaving the fall to be handled by a workman apparently intoxicated or giving the order to "hoist again" when the fall was foul of the chocking-block might be found to be an act of great carelessness, resulting directly from an unfitness of the foreman, known by the defendant or with knowledge of which he was chargeable, and which made it a breach of his duty toward the plaintiff to keep the foreman at work with the plaintiff. This breach of duty was sufficiently shown to have been the cause of the accident to enable the jury to find for the plaintiff upon that ground. This is so, in our opinion, upon either count of the declaration; under the first count, for an injury resulting from a breach of the defendant's duty to use due care in providing for the plaintiff proper fellow workmen; and under the second count, for negligence of the foreman in giving the order to "hoist again" when

¹ Rev. Laws, ch. 106, § 71.

if he had been careful he would have seen that the fall was foul of the block, as well as for negligently allowing the fall to be handled by a workman apparently intoxicated, in each of which acts the foreman was exercising superintendence.

The defendant insists that the plaintiff did not sustain the burden of showing that the foreman's sole or principal duty was that of superintendence; but while another person was employed by the defendant as his general superintendent, that person was not present at the time. The defendant testified that the foreman was foreman of the gang, and had authority to employ and dismiss men, and frequently had charge of the jobs. There was abundant evidence that he had charge of this work, and gave all the directions which were given, and no testimony that he worked or was expected to work with his own hands. The evidence required a finding that on this occasion at least the foreman's sole or principal duty was that of superintendence.

The defendant's contention that the proof did not support the allegations of the declaration cannot be sustained. The charge in the first count, of employing incompetent men, did not rest alone upon his employment of McQuade, who handled the fall, and was supported by the evidence as to the foreman. The specification in the second count as to the negligence of the foreman "in failing properly to use, handle, manage, and control said pile-driver and the engine, machinery, dog, yoke, chocking-block (so-called), gearing, ropes, and guys thereof," must, after verdict, the evidence having been admitted without objection, be held to have been supported by proof that the foreman negligently allowed the fall to be handled by a drunken workman, and that the foreman himself negligently gave the order to "hoist again" when the fall was fouled with the chocking-block.

Exceptions overruled.

O'MALEY *v.* SOUTH BOSTON GAS LIGHT COMPANY.

Supreme Court of Massachusetts, December, 1892. 158 Mass. 135.

TORT, under the St. of 1887, c. 270,¹ for personal injuries occasioned to the plaintiff while in the defendant's employ. Trial in the Superior Court, before Sherman, J., who, at the defendant's request, directed the jury to return a verdict for the defendant; and, at the plaintiff's request, reported the case for the determination of this court. If the ruling was correct, the verdict was to stand; otherwise, the verdict was to be set aside and a new trial granted. The facts appear in the opinion.

KNOWLTON, J. The plaintiff, while wheeling coal in a barrow on

¹ Rev. Laws, c. 106, §§ 71-79.

a run in one of the defendant's coal sheds, fell off and was injured. The action is brought under the Employers' Liability Act (St. 1887, c. 270), for an alleged defect in the ways, works, or machinery of the defendant, it being contended that the defendant was negligent in not providing guards on the runs to prevent such an accident. The plaintiff testified, and it was undisputed, that he had assisted in the same work at various times during the last fifteen years, and that the coal shed and runs had all the time remained unaltered in construction.

If the action were at common law, it would be too plain for argument that the plaintiff took the risk of such accidents as that which happened, and that the defendant is not liable. *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 155; *Mahoney v. Dore*, 155 Mass. 513. But it is contended that, under the statute referred to, the rule is different.

It is well settled that, in the absence of a special contract affecting the rights and liabilities of the parties, the statute has taken away from defendants, in the cases mentioned in it, the defence that the injury was caused by the act of a fellow-servant of the plaintiff. It is also established by an adjudication of this court, and by decisions under a similar statute in England, that it has not taken away the defence that the plaintiff, knowing and appreciating the danger, voluntarily assumed the risk of it. *Mellor v. Merchants' Manuf. Co.* 150 Mass. 362; *Thomas v. Quartermaine*, 18 Q. B. D. 685; *Yarmouth v. France*, 19 Q. B. D. 647; *Thrussell v. Handyside*, 20 Q. B. D. 359; *Walsh v. Whiteley*, 21 Q. B. D. 371; *Smith v. Baker*, [1891] A. C. 325. Precisely how and when this defence can be availed of in cases where the ways, works, and machinery of the defendant are found to be defective, has never been decided in this Commonwealth. The nature of the defence was somewhat considered in *Fitzgerald v. Connecticut River Paper Co.* and *Mahoney v. Dore*, *ubi supra*, which were cases at common law, and it was held that, to be precluded from recovering on this ground, the plaintiff must not only know and appreciate the risk, but must assume it voluntarily. The doctrine of assumption of the risk of his employment by an employee has usually been considered from the point of view of a contract, express or implied; but as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim, *Volenti non fit injuria*. One who, knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible

for the danger. If there is a failure to do his duty according to a high standard of ethics, there is, as between the parties, no neglect of legal duty.

That part of the statute under which this action is brought gives a remedy only for defects "which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition." A proceeding under it necessarily involves the question whether there was negligence in not having the ways, works, and machinery in better condition. The negligence referred to is the neglect of a duty owed to the plaintiff, and not of a general duty, which, by reason of the relations of the parties, does not extend to him.

The statute does not attempt to take away the right of the parties to make such contracts as they choose, which will establish their respective rights and duties. In the numerous enterprises of every kind which involve the employment of labor, there is necessarily almost every degree of danger to employees. Improvements are constantly being made in the methods of doing business, and in the ways, works, and machinery used. The adoption of the latest and best machinery would often involve the displacement and loss of that which has been but little used, and which was the best obtainable when bought. It would be unreasonable to attempt to require every one hiring laborers to have the safest place and the best machinery possible for carrying on his business. It would be an unwarranted construction of the statute, which would tend to defeat its object, to hold that laborers are no longer permitted to contract to take the risk of working where there are peculiar dangers from the arrangement of the place and from the kind or quality of the machinery used. Nothing but the plainest expression of intention on the part of the Legislature would warrant giving the statute such an interpretation. We have no doubt that one may expressly contract to take the obvious risks of danger from inferior or defective machinery as well since the enactment of this statute as before. If he does so, his employer owes him no duty in respect to such risks, and if he is hurt from a cause included in the contract, the defect is not within the terms of the statute, the maxim, *Volenti non fit injuria*, applies, and he cannot recover. Whether he knows and appreciates the particulars of the danger is immaterial, if he knows there is danger, and expressly contracts in regard to it without caring to know the particulars, and in such a case he must be deemed to encounter it willingly. One who makes a contract to enter into a new relation undertakes voluntarily what he agrees to do, and his agreement, inasmuch as the other party acts upon it, is to be construed in reference to the obvious facts and circumstances to which it pertains. When he agrees to assume the

risk from a certain kind of machinery, his action is equally voluntary in reference to every such risk, whether he fully appreciates the danger or chooses to take the risk of it without knowing its extent; and he absolves his employer from what otherwise would be a duty to make the machinery safer.

The same reason applies equally where the employee, without any express stipulation in regard to risks, enters a service which, by reason of the obvious condition of the ways, works, and machinery, involves peculiar dangers. Such a contract is implied as ought to be implied from the situation and dealings of the parties, and it has the same effect as if expressly made. The work to be done may have special reference to defects in the works or machinery. One may be hired to make repairs which expose him to peculiar dangers by reason of the condition of the defective parts. Surely it cannot be said that a workman does not impliedly contract to take the obvious risks from the condition of the machinery, when he agrees to do work in the repair of it. Nor can it any more be said that he does not impliedly make a similar contract, when he agrees to work in a business involving obvious dangers by reason of the inferior machinery with which he knows it is to be carried on. He is free to accept the service or not, as he chooses, and, if harm comes to him by reason of his acceptance of it, he suffers voluntarily.

It is manifest that these considerations in reference to a contract, express or implied, do not apply to dangers resulting from conditions which arise or defects which come into existence after the making of the contract, which cannot be deemed to have been contemplated when the contract was made.

The precise question involved in this case does not seem to have been settled in England, although there has been much discussion and a variety of opinion in regard to questions closely allied to it. It is held by all the judges there that the maxim, *Volenti non fit injuria*, applies as well to actions under the statute as to those at common law; but none of the cases which have come to our attention have determined the effect of a contract to work in a place obviously dangerous by reason of inferior machinery or appointments when the contract was made. Sometimes it seems to have been assumed that the defence of an implied contract to assume the ordinary risks of a business is taken away by the statute, without recognizing any distinction between an implied contract founded on the known condition of the ways, works, and machinery in reference to which the contract is made, and a contract in reference to dangers from the negligence of fellow-servants, or the subsequent neglect of the master. In *Walsh v. Whiteley*, 21 Q. B. D. 371, the decision of the Lords Justices Lindley and Lopes, a majority of the Court of Appeal, tends to support the view we have taken, although the judgment is on different grounds. So also does the judgment in *Thomas v. Quarter-*

maine, 18 Q. B. D. 685, which has been often considered and explained, but never overruled. In *Smith v. Baker*, [1891] A. C. 325, elaborate opinions were given in the House of Lords, showing considerable difference of view on some of the questions we have been considering; but the effect of a contract to work under exposure to peculiar dangers from machinery, obvious when the contract was made, was not much considered.

In the present case, the plaintiff when he made his contract knew and fully appreciated the dangers to which he was about to expose himself; for they were obvious, and he had been accustomed to work on the runs, from time to time, for fifteen years, during which period they had remained unchanged. We are of opinion that he impliedly contracted to work on the runs as they were, and that, if they can be considered defective, the defect is not within the description in the St. of 1887, c. 270, § 1, inasmuch as the defendant owed him no duty in regard to it, and he cannot say that its continued existence was owing to the negligence of his employer.

Judgment on the verdict.

POWERS *v.* NEW YORK, LAKE ERIE & WESTERN RAIL-ROAD COMPANY.

Court of Appeals of New York, March, 1885. 98 N. Y. 274.

ACTION for damages by reason of alleged negligence causing the death of the husband of the plaintiff administratrix. The plaintiffs, of whom there were several suing upon letters of administration, were nonsuited at the trial on the ground that no case was made, and the order of nonsuit was reversed by the General Term, and a new trial granted. Appeal therefrom. The facts appear in the opinion of the court.

MILLER, J. The intestate was killed by being thrown from a hand-car which he and other employees were propelling upon the defendant's road. The complaint alleged that the handcar was unsafe and improperly constructed, and the proof showed that two or three weeks before the accident one of the handles to the walking-beam was broken and that defendant's employees continued to use the car with the handle of a pick or an iron crowbar in the place of the broken handle, it being inserted in the socket by some of them without any direction from the section boss. The crowbar was about five and one-half feet in length, and when used as a handle one end projected four feet and the other one and one-half feet from the socket of the lever. On the day of the accident some of the workmen had inserted the crowbar in the place of the handle that was gone, and observing a train approaching from behind on the same track, instead of removing

the handcar to the other track, as was usually done, they started to run it to a distant switch and thus escape the train. They worked the car with all the force they could, using five men on the crowbar instead of three, the usual number. Three of them, including the intestate, were on the long arm, one on the short arm, and one in the centre. The working of the crowbar by the men in the manner in which it was done evidently wrenched the lever or beam by which the car was operated, so that it broke, throwing the intestate under the car and killing him. Prior to the accident the intestate had full knowledge of the defect in the handcar, and voluntarily continued in the employ of defendant without complaining of or objecting to it. By riding on the car and aiding, by the use of the crowbar, in propelling it along on the track, he assumed all risks of injury resulting from the use of the crowbar or from the negligence of his fellow-servants, without any regard whatever to the question whether the defendant knew of the defect or ought to have had knowledge of the same. 2 *Thomp. on Neg.* 1008 et seq.; *Gibson v. Erie Railway Co.* 63 N. Y. 453; *De Forest v. Jewett*, 88 N. Y. 264.

The deceased was an employee on the road, and no doubt was possessed of the ordinary judgment and sense of those who occupied a similar position. He had sufficient knowledge to understand the ordinary rules which are applicable to the use of a car which was partially disabled, as was the case here. He must have known that the use of the crowbar required the usual care, and would not be as safe and secure as if a proper handle had been in use. He must also have known that the application of extraordinary force, under the circumstances, might perhaps cause the accident by wrenching the walking-beam, as was done by such a use of the crowbar in this case. It did not require a special knowledge or skill to determine that an unusual application of force might result either in the breaking of the handle or the walking-beam. Working on the car as he did, with ample knowledge in regard to its operation, and fully aware of its condition, there would seem to be no ground for claiming that there was any question of fact for the consideration of the jury as to the intestate's knowledge of the risk he incurred in using the car and improperly using the crowbar in propelling the same.

There is a class of cases in the books in which it is held that the question arising as to the knowledge of an injured party in regard to defects in machinery or materials may be submitted to the jury, but these cases are all clearly distinguishable from the one at bar, where it is plainly apparent that knowledge must have existed as to the character of the implements or machinery employed and of the risks incident thereto, and that the injured party acted with an entire appreciation of the actual condition of the car on which he was riding, fully realized the state in which it was, and did not deem it essential to make any complaint, or give any notice to the defendant that

he considered it unsafe or unfit for use. In the case of *East Tennessee, &c., R. Co. v. Smith*, 9 Lea (Tenn.), 685, the accident occurred by reason of the breaking of a handle on a handcar under circumstances similar to those presented in the case at bar, and the question discussed was as to the defect in one of the wooden handles of the lever which was claimed to be too small for the purpose, and it was held by the court that the determination of such a matter required no special knowledge or scientific skill, and if with such knowledge the plaintiff elected to continue in the service he should be regarded as voluntarily electing himself to take the risk.

This rule may be invoked with far greater reason in the case considered, where the simple question was, whether the car could be properly used in the manner it was after substituting the crowbar in the place of the handle.

We are referred to the remarks in the opinion in the case of *Laning v. New York Cent. R. Co.* 49 N. Y. 521, to the effect that if the servant remains in the service after a defect arises and complains of the same, it is for the jury to say whether or not he voluntarily assumed the risk of defective machinery whereof he has full and equal knowledge. The alleged defect in that case was the employment of unfit men, of which the person had knowledge and made complaint; and while the rule stated may well apply to such a case, it cannot be regarded as pertinent to one where it is clear and unmistakable that the employee not only had knowledge but a full appreciation of the character of the instrumentalities with which he was working, and made no complaint.

It is true that regard must be had to the limited knowledge of the employee as to the machinery and structure on which he is employed, and to his capacity and intelligence, and that the servant has a right to rely upon the master to protect him from danger and injury, and in selecting the agent from which it may arise; *Connolly v. Poillon*, 41 Barb. 366; but this rule should not be invoked where it is entirely apparent that the servant has an intelligent and clear comprehension of the nature of the risks to which he is subjected. Some other cases are cited by the respondents' counsel, but they are all distinguishable from the case at bar, and none of them hold that where the evidence clearly shows that the person injured had full knowledge of the defect and intelligently and completely appreciated its true character, there was any question of fact for the consideration of the jury.

It is apparent, we think, under the facts presented that the intestate, with full knowledge of the defects in the car, assumed the responsibility of working on the same and the risks arising therefrom, and that no liability was incurred by the defendant by reason of the accident which caused his death. There is far stronger reason here for relieving the defendant from liability, where the defect did not exist originally, and when the servant upon discovering it failed to

perform his duty in notifying the master, than under ordinary circumstances. By his neglect of duty in this respect he was chargeable with contributory negligence, which prevents his recovery of damages on account of being injured by reason of the use of the defective handcar.¹

We are also of the opinion that the action cannot be maintained for the additional reason that the deceased was chargeable with contributory negligence in the use of the handcar by himself and his fellow-servants in the manner in which it was propelled at the time of the accident. It was clearly negligence to seek to avoid the train in the manner they did. The deceased participated with his fellow-servants in this act and was responsible for the consequences which followed.

There was no question of fact for the jury upon the trial; and for the reasons stated the motion for a nonsuit was properly granted, and the General Term erred in reversing the judgment. The order of the General Term should be reversed and judgment entered on the order nonsuiting plaintiff at circuit.

Order reversed.

ANDRECSIK *v.* NEW JERSEY TUBE CO.

Court of Errors and Appeals of New Jersey, November, 1905. 73 N. J. L. 664.

THE case is stated in the opinion.

DILL, J. This action is brought to recover damages for personal injuries sustained by the plaintiff, while in the defendant's employ, through the defendant's alleged negligence.

The plaintiff, a man twenty-eight years of age, had been employed in the defendant's mill for about two years prior to the accident—eighteen months as helper, about two months as an assistant upon the machine, and about three months prior to the injury in charge of the machine at which he was injured. When placed in charge of the machine he was instructed as to its workings.

Prior to ten o'clock, in the morning of November 11th, 1903, the day upon which he was injured, the plaintiff discovered that the machine upon which he was working was out of order. He testified that this was very easy to see.

About ten o'clock he complained of this to the superintendent, who replied: "You go right ahead with the work; we are overloaded with work, and noon hour I will fix this for you."

What a third party understood the superintendent to say is not material to this decision. The foregoing is what the plaintiff asserts

¹ This appears to be but a remark by the way, and perhaps was not as fully considered as if the case had turned upon it.

the superintendent promised him, and was the agreement to repair upon which the plaintiff relied in resuming work.

The plaintiff continued to work on the machine until the noon hour, quitting at twelve o'clock, without injury. He ate his lunch near the machine — in sight of it — and was in and about the place during the noon hour. During the noon hour, from twelve to one o'clock, the machine was not repaired, and this was apparent to the plaintiff. The defective condition of the machine when the plaintiff resumed work was obvious.

At one o'clock the plaintiff resumed work and continued until three o'clock, when he was injured by the defective machine.

No evidence was offered in behalf of the defence.

The Chief Justice, who tried the case below, nonsuited the plaintiff, and, holding the promise to be definite as to the time of performance, laid down this rule: "Where the master says that he will repair the machine, or have it repaired, at a specific time, the employee is entitled to continue to operate the defective machine at the master's risk until that time has elapsed; but if, after that time, the master has not made good his word, and made the repairs, and the employee still continues to operate the machine, the risk shifts, and the employee assumes it, relieving the master."

The plaintiff in error seeks to review this ruling, and for that purpose this writ of error is prosecuted.

We are of the opinion that the rule laid down by the Chief Justice was correct, and that the nonsuit was proper.

The questions of law decisive of the case at bar have not been heretofore passed upon by this court.

The plaintiff was engaged in operating a machine which was obviously defective. He was aware of the danger incident to such defective condition.

The servant, by accepting employment or voluntarily continuing therein with the knowledge or means of knowing the dangers involved, is deemed to have assumed the risk.

This rule the plaintiff seeks to avoid by proof that he notified the master of the defect, and that the master, for the purpose of inducing the plaintiff to continue in his employment, promised to remedy it.

The question presented is whether the servant was chargeable, in spite of the promise, with the assumption of the risk in question and as a conclusion of law. The decision must, in the first place, depend upon the character of the promise to repair. Was it express or inferential as to time of fulfillment? If inferential, there may have been a question for the jury. If express, there was no question for the jury on that point.

The words "noon hour" are definite terms: "Noon — mid-day and in exact use twelve o'clock." — Cent. Dict. "Hour — a particular time; a fixed or appointed time." — Id.

"Noon" designated the beginning of the period, i. e., twelve o'clock; "hour," the duration of the period.

It is clearly shown by the evidence that the term "noon hour" was in common use, and was well understood by both parties to mean from twelve o'clock noon to one o'clock in the afternoon.

The plaintiff says he quit work at twelve o'clock and went to work at one o'clock.

Again, he was asked if he worked "before the noon hour" on the day on which he was injured. "Yes, sir," he answered, "I started at seven and worked until twelve."

The words "noon hour" are used by the plaintiff and his witnesses, and always as meaning from twelve o'clock noon to one o'clock in the afternoon.

In *King-Ryder Lumber Co. v. Cochran*, 71 Ark. 55, the plaintiff, who was running an edging machine in a lumber mill, discovered a defect in the machine in the morning and informed the foreman, who told him "to go and run it until noon, when he would have it repaired."

The court treated this as a promise to repair at a definite time, and it is cited by subsequent authorities as a definite promise. Otherwise the case is not in point.

In the case before us, we are of the opinion that the promise to repair was not general, but specific, as to time of performance.

The time when the promise to repair should have been fulfilled is too clear for reasonable controversy. There was no need of submitting that question to the jury, or any other question bearing upon the subject.

In discussing the further questions involved it should be noted that in this case:

First. The promise to repair, made after the work was begun, was definite as to the time of performance.

Second. The accident did not occur between the time of the making of the promise and before the end of the period fixed for its fulfillment.

Third. The injury was subsequent to (a) the complaint, (b) the promise, (c) the agreed time of performance, and (d) the master's default.

In resuming work under these circumstances, was the risk the servant's or the master's?

The two recent cases in the Supreme Court (*Dowd v. Erie Railroad Co.*, 41 Vroom 451, and *Dunkerley v. Webendorfer Machine Co.* 42 Id. 60), have not heretofore been before this court.

In both the master's agreement was indefinite as to the time when the repair was to be made.

In the *Dowd* case the promise was to have it attended to "as soon as he could."

In the Dunkerley case the agreement was to remedy the fault "at the first opportunity."

In the Dowd case, Mr. Justice Swayze states the law to be as follows:

"The rule that the servant assumes not only the ordinary risks incident to the employment, but also such special features of danger as are plain and obvious, and also such as he would discover by the exercise of ordinary care for his personal safety, is well established in this state (citing cases).

"The servant assumes, as well, those risks which arise or become known to him during the service as those in contemplation at the original hiring. *Dillenberger v. Weingartner*, 35 Vroom 292 (Court of Errors and Appeals, 1899).

"To the rule that the servant assumes the obvious risks of the employment, an exception is made where the master has promised to amend the defect or to make the place safe, and the servant continues the work in reliance upon the promise. . . .

"The master is exempted from liability in the case of obvious risks for the reason that the servant, by continuing in the employment with knowledge of the danger, evinces a willingness to incur the risk, and upon the principle *volenti non fit injuria*. But when the servant shows that he relied upon a promise made to him to remedy the defect, he negatives the inference of willingness to incur the risk. In such a case this inference can only be drawn when the servant continues the work, although the promise is not performed within a reasonable time." 41 Vroom 451 (at p. 455).

We are referred to the decision of the Supreme Court of the State of New York, in *Rice v. Eureka Paper Co.*, 70 App. Div. 336, as the leading authority for the insistence that the Dowd case should not be approved by this court.

The answer to this argument and the citation in its support is twofold.

In the first place, the decision of the New York Supreme Court in the Rice case is not in conflict with the Dowd case.

In the Dowd case, the promise to repair was indefinite as to time of performance by the master. The court construed it to be a general promise. In the Rice case, the New York Supreme Court construed the promise to repair as specific, and based its conclusion upon that construction of the promise. 70 App. Div. (at pp. 342 et seq.) It held that, in a case where the promise was to repair at a definite time, the risk in the interim between the time of the making of the promise and the time set for its performance was that of the servant, and not of the master. *Id.* 354.

In the second place, the Court of Appeals of New York reversed the Supreme Court. *Rice v. Eureka Paper Co.*, 174 N. Y. 385; reversing 70 App. Div. 336.

The Court of Appeals overruled the holding below as to the character of the promise to repair; declared that it was not specific as to time of performance (*Rice v. Eureka Paper Co.*, 174 N. Y. 385) (at p. 397); construed it as a promise to repair generally, indefinite as to the time of its performance (*Id.* 398), and, proceeding upon that construction, established the law of that state in harmony with the doctrine of the Dowd case.

The doctrine of the Dowd case is supported by the authorities cited by Mr. Justice Swayze, by the decision of the Court of Appeals of New York in the Rice case, by the eminent text-writers and the leading cases ably marshalled in the opinion therein, and, in addition, by the following authorities: *Ray v. Diamond State Steel Co.*, 2 Penne. (Del.) 525; *Boyd v. Blumenthal*, 3 Id. 564; *Belair v. Chicago, &c., Railroad Co.*, 43 Iowa 662; *Buchner v. Creamery Package Manufacturing Co.*, 124 Id. 445; *Foster v. Chicago, &c., Railroad Co.*, 127 Id. 84; *Brown v. Levy*, 108 Ky. 163; *Taylor v. Nevada, &c., Railroad Co.*, 26 Nev. 415; *Pleasants v. Raleigh, &c., Railroad Co.*, 95 N. C. 195; *Barney Dumping Boat Co. v. Clark*, 112 Fed. (C. C. A.) 921; 1 *Labatt's Master and Servant*, 1209, s. 427b.

The rule of the Dowd case is so generally recognized as a part of the jurisprudence of this country and is so strongly supported by reason and justice as to justify its adoption. We accordingly approve the decision of the Supreme Court of this state in *Dowd v. Erie Railroad Co.*, 41 Vroom 451.

The approval of *Dunkerley v. Webendorfer Machine Co.*, 42 Vroom 60, follows, as a matter of course.

Thus far we have dealt with those cases where the master's promise to repair was general, and not specific, as to time of performance.

We come, now, to consider the application of the rule to those cases where, as in this case, the time of performance is definitely fixed by the agreement of the parties. The authorities where the promise has been of this character are comparatively few.

Two questions arise in a case where the promise to perform is definite:

First. Is the ad interim risk between the making of the promise and the termination of the period fixed therein for its performance the master's or servant's?

It has been held by the authorities of repute that during the interim the servant assumes the risk, on the ground that before the time definitely agreed upon for the making of the repairs he can have had no expectation that such repairs would meanwhile be made, and therefore cannot, in the interim, have continued his service because of such expectation. *Standard Oil Co. v. Helmick*, 148 Ind. 457, and *Rice v. Eureka Paper Co.*, 70 App. Div. 336 (New York Supreme Court), are generally cited in support of this theory.

These decisions are dependent upon facts and supported by prin-

ciples not involved here. Their conclusions are reached by divergent and not harmonious lines of reasoning. The Supreme Court of Indiana subsequently, in the Potter Case, post, disavowed this doctrine. The Rice case was reversed by the Court of Appeals of New York, although upon another point.

We do not agree with the rule in support of which these cases are cited and decline to adopt it.

It has also been held, and with better reason, that, as in the case of a general promise, carrying with it an implication of performance within a reasonable time, so also in the case of a promise to remedy a defect at a definite and agreed time, the master *eo instante* assumes the risk from the time of the making of the promise up to and including the expiration of the time specified for its fulfillment. *Louisville Hotel Co. v. Kaltenbrum*, 80 S. W. Rep. 1163; upon application for rehearing, 82 Id. 378; *King-Ryder Lumber Co. v. Cochran*, 71 Ark. 55; *Anderson v. Seropian*, 147 Cal. 201; *McFarlan Carriage Co. v. Potter*, 153 Ind. 107 (at p. 114); overruling on this point (at p. 116) *Standard Oil Co. v. Helmick*, supra.

The rule that a promise to repair made by the master, acted upon by the servant, creates an assumption of risk by the master, beginning *instante* upon the making of the promise and continuing thereafter to the end of the period named for the repair, is supported by sound reason, by the weight of authority, and is in accord with the reasoning of the Dowd case.

Second. At whose risk does the servant continue his work after the lapse of the time specified for the making of the repair and after the master has obviously defaulted in the performance of such promise?

Upon this point we are referred to the following cases: *Louisville Hotel Co. v. Kaltenbrum*, 80 S. W. Rep. 1163 (Court of Appeals of Kentucky 1904); *Eureka Company v. Bass*, 81 Ala. 200 (1886); *Trotter v. Chattanooga Furniture Co.*, 101 Tenn. 257 (1898).

The facts in the Louisville hotel case differ from those in the case at bar, since the injury there occurred between the making of the promise and the time set for its performance. That case does not decide that the master's assumption of risk terminates with the time set for the performance of the promise, which is the question before us. The case goes no further than to hold that upon the making of the promise the master *instante* assumes the risk and is responsible for an injury occurring between the time of the making of the promise and the time appointed for its fulfillment.

In the Bass case, the complaint of the servant was of a defective fuse, and the master promised "to get other fuse," and told him to "do the best he could with what he had." The court treated this as a general promise involving the question of a reasonable time, but in arriving at its conclusion it used the following language pertinent to

the question before us: "The injury, in other words, must have occurred within the time at which the defects were promised to be removed. If the employee continues to expose himself to the danger by remaining in the service longer than this, he does so in face of the fact that the promise of the employer is violated, and that he has no reasonable expectations of its fulfillment. He can no longer, therefore, rely upon the promise, and must know that his continuance in service under such circumstances is equally as hazardous and hopeless of remedy as if no assurance or promise had ever been made. A promise already broken can afford no reasonable guarantee of the fulfillment of any expectation based on its disappointed assurances."

In the recent case of *Gunning System v. Lapointe*, 212 Ill. 274 (1904), there is also a dictum — dictum because the promise in the case was a general one — that "if the promise is to repair by a fixed time, then, after the expiration of the time fixed, the servant assumes the risk from the defects complained of."

Trotter v. Chattanooga Furniture Company is the only one of the three cases cited which is in point. In that case the promise was definite to repair "in the morning." The promise was not kept, but the servant continued his work, and the injury occurred ten days after the time set for the performance of the promise.

The court held that the servant had reassumed the risk, citing in support of its decision the *Bass* case, relying upon the language of that case already quoted.

In the *Trotter* case the court, affirming the judgment below nonsuited the plaintiff, said: "We do not think it would have been proper, in this case, to have submitted to the jury the question as to what was reasonable time. The promise fixed the time."

A well reasoned authority in point is the decision of the Supreme Court of Wisconsin (1901), in *Albrecht v. Chicago & Northwestern Railway Co.*, 108 Wis. 530. In that case a locomotive fireman was ordered, about five o'clock in the afternoon, to go on a trip, which was subsequently made at ten o'clock in the evening. At seven-fifteen in the evening he went on board the engine and performed various duties. At eight o'clock in the evening he complained to the engineer of the absence of a shield over the glass indicating the oil-supply, stating that he had searched for the shield and failed to find it, adding, "You must get a shield for this lubricator," to which the engineer replied, "All right, I will get one." The engineer did not keep his promise. The fireman was in and about the cab from eight o'clock to ten o'clock in the evening, and then went on the trip in spite of the fact that the engineer had not kept his promise, and although the fireman saw that the shield was not in its place. At one o'clock in the morning the glass burst and he was injured by reason of the absence of the shield.

The court below held the engineer's undertaking to be a general

promise, and left it to the jury to determine the question of reasonable time. The Supreme Court, reversing the holding below, construed the promise made at eight o'clock in the evening to be a promise on the part of the engineer to furnish the shield before the trip was made at ten o'clock in the evening, and held the promise to be definite as to time of performance, and that there was no question to be submitted to the jury, saying:

"When the time expired for the engineer to redeem his promise, under the circumstances indicated, respondent was no longer protected thereby in his right to hold defendant responsible for the consequences of the danger. . . .

"In proceeding thereafter in the defendant's service, he voluntarily assumed the risk of which he had complained as a part of his contract of employment, and is remediless for what followed."

We agree with Mr. Labatt, in his recent work on "Master and Servant," that "the only rational view seems to be that as soon as the period contemplated for the removal of the dangerous conditions terminated, the servant's position is precisely what it would have been if no promise had been given; that is to say, he reassumes the risk." 1 Labatt Mast. & Serv. 104, s. 425.

Upon the point of the termination of the master's liability, Mr. Justice Swayze, in the Dowd case, says: "The failure to perform the promise (to repair "as soon as he could") within a reasonable time, indicates that it will not be performed, and the continuance in the work thereafter justifies the inference that the servant did not rely upon performance of the promise, but was willing to take the risk. He is, therefore, in such a case, held to have assumed the risk, notwithstanding the promise." 41 Vroom (at p. 456).

This proposition relating to a general promise is supported by the following authorities: *Eureka Company v. Bass*, 81 Ala. 200; *Illinois Steel Co. v. Mann*, 170 Ill. 200; *Gunning System v. Lapointe*, 212 Id. 274; *Burns v. Windfall Manufacturing Co.*, 146 Ind. 261; *Breckenridge Company v. Hicks*, 94 Ky. 362; *Stalzer v. Packing Company*, 84 Mo. App. 565; *Gulf, &c., Railroad Co. v. Brentford*, 79 Tex. 619; *Stephenson v. Duncan*, 73 Wis. 404; *Coreoran v. Milwaukee Gaslight Co.*, 81 Id. 191; *Ferriss v. Berlin Machine Works*, 90 Id. 541.

Similarly, where the agreement as to the time of performance is by the parties clearly defined, the failure to perform the promise within the agreed time indicates that it will not be performed, and a continuance of the work thereafter justifies the inference that the servant no longer relied upon the performance of the promise, but was willing to take the risk. In such case, also, the servant must be held, where there is a manifest breach of the agreement to repair, to have reassumed the risk at the expiration of the time fixed for the performance of the master's promise.

The principle applicable to both classes of cases is that when the

time appointed for the removal of the conditions giving rise to the danger expires, whether that period be expressly or impliedly fixed, the servant's relation to the master is precisely the same as if no promise had been made. He is relegated back to his original position and reassumes the risk. After the master has manifestly defaulted in his promise to repair, the servant resumes work with no existing contract on the part of the master to assume the risk, and therefore continues at his (the servant's) risk.

In the present case, where the promise was to repair the defect at a specified time, and where the master had manifestly failed to make the repair within the time specified, the servant, in resuming work thereafter, brought himself again within the original rule, and assumed not only such special features of danger as were plain and obvious, but such as he would discover by the exercise of ordinary care for his personal safety.

The conclusions which we have reached negative the proposition that whenever it is proved that a promise to repair was made and acted upon the case is *prima facie* for the jury.

The master, in the making of the promise, and the servant, in acting upon it, fix their mutual relation.

Where the promise to make the repair is indefinite or inferential as to the time of the performance, there may arise a question for the jury of reasonable time — on the part of the master for performance, and consequently on the part of the servant for continuing to incur the risk in the expectation that the master will perform.

Where, however, the promise is express as to time of performance, the rule is otherwise.

A promise made by the master, acted upon by the servant, to repair a specified defect at a definite time thereafter, creates an assumption of the risk by the master. This assumption of risk begins forthwith upon the making of the promise and continues thereafter and throughout the period fixed for the making of the repair; but this undertaking of the master terminates and his liability thereunder ceases at the end of that period. The termination of the master's undertaking and the termination of the period fixed for repair are identical in point of time.

In such case it would be error to submit to the jury any question relating thereto which would enable the jury to find, in conflict with the terms of the contract, that the responsibility on the part of the master still existed after the expiration of the period during which the master had agreed to undertake it.

As a rule, whether the promise is general or definite is a question for the court.

It follows, therefore, both on principle and by authority, that the nonsuit below was proper.

The judgment of the Supreme Court is affirmed.

For affirmance — The Chancellor, Garrison, Fort, Garretson, Hendrickson, Swayze, Reed, Vredenburg, Vroom, Green, Gray, Dill — 12.
For reversal — Pitney, Bogert — 2.

**BROCKETT v. FAIRHAVEN & WESTVILLE RAILROAD
COMPANY, ET AL.**

Supreme Court of Connecticut, December, 1900. 73 Conn. 428.

Action to recover damages for personal injuries sustained in a collision between the trains of the defendants, alleged to have been caused by the defendants' negligence. The collision occurred at a grade-crossing. The plaintiff jumped or was hurled from the car of one of the defendants, on which she was a passenger. At the trial (on the question of damages) the defendants contended, *inter alia*, that judgment could not be rendered on the plaintiff's complaint because it contained "no allegation of due care" on the part of the plaintiff. The plaintiff had judgment for \$500, and one of the defendants appealed, assigning the refusal of the lower court to rule as requested, as error.¹

HAMERSLEY, J. [After discussing other grounds of error, the court proceeded:]

There is no error in the rulings of the court upon the defendant's claims made upon the trial. The claim that judgment could not be rendered for substantial damages because the complaint contains no allegation that the plaintiff was in the exercise of due care, is without foundation. The allegation that the injury complained of was caused by the negligence of the defendant, is not established if in fact the injury was also caused by the negligence of the plaintiff; and in this State the burden of proof is on the plaintiff to show that his negligence was not a contributory cause of the injury. By the general law of negligence, every person is bound to exercise ordinary care in his acts and omissions that may endanger others; if he neglects to do this he violates a legal duty which he owes to each person who may be exposed to the danger, and the injured party has a right of action against such wrongdoer. But in such case the injured party is subject to the same law; he owes the same duty, and is likewise in fault if he violates that duty. When an injury to one results from the fault of both, the equitable rule would be that each should suffer in proportion to his wrong. But on grounds of public policy the law has established an arbitrary rule that when the injury complained of has been caused by culpable negligence of both plaintiff and defendant, it has not been caused by the negligence of the defendant, and so the

¹ Other grounds of error, and questions of pleading have been omitted.

plaintiff cannot recover for the injury. *Park v. O'Brien*, 23 Conn. 339, 345; *Brown & Bros. v. Illius*, 27 Id. 84, 92; *Isbell v. New York & N. H. R. Co.*, *Ibid.* 393, 406; *Bartram v. Sharon*, 71 Id. 686, 689; *The Bernina, L. R.* 12 Prob. Div. 36, 89. This arbitrary rule not only affects a right of action, but operates as a rule of evidence. The fact that the plaintiff's injury was caused by the negligence of the defendant, demands evidence that it was not also caused by the plaintiff's negligence. This view logically supports the rule followed in this and some other States, that the burden of proof upon the question of contributory negligence rests upon the plaintiff; and it also logically supports the conclusion that an allegation that the injury to the plaintiff was caused by the negligence of the defendant necessarily involves the allegation that the negligence of the plaintiff did not contribute to the injury. Therefore, in a complaint sounding in tort, to recover for an injury due to the negligence of another, a direct allegation that the injury was caused by the defendant's negligence must involve the allegation that the negligence of the plaintiff did not contribute to the injury; in such case a separate allegation to that effect is unnecessary. There need be no direct allegation of a fact necessarily implied from other averments. *Lord v. Russell*, 64 Conn. 86, 87. Where a direct allegation of the exercise of due care on the part of the plaintiff may be proper, as in action on the statute for injuries caused by a defect in a highway, it is sufficient in substance to allege facts which show that the plaintiff was in the exercise of due care. In the complaint before us, the fact that the injury was caused by the negligence of the defendant is not directly alleged, but the facts alleged show that the injury was so caused and that the negligence of the plaintiff did not contribute to the injury. We think the complaint supports the judgment.

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

NOTE: Whether the plaintiff's negligence did contribute to the injury is a question of proximate and remote cause, considered *post* p. 000 et sqq.

WEISS v. PENNSYLVANIA RAILROAD COMPANY.

Supreme Court of Pennsylvania, October, 1875. 79 Pa. St. 387.

ACTION for negligence by the plaintiffs, widow and minor children of Jacob Weiss, deceased, to recover damages for the killing of the deceased by one of the defendant's trains. At the trial it appeared in evidence that Parade Street in the City of Erie crossed the tracks of the defendant's railroad, north and south; that at the place of crossing

there were two tracks of the defendant's road, and four tracks of the Lake Shore and Michigan Railroad farther north; that the station of the defendant railroad was west of the crossing at Parade Street; that freight cars were standing on the defendant's northerly track and that one of them extended so far into Parade Street that travellers in passing were obliged to go out into the street; that other freight cars stood on the same track on the easterly side of Parade Street, and that there was but a narrow passage between the freight cars on either side of the street; that the deceased, driving southerly along Parade Street and across the tracks, was struck and killed by a passenger train of the defendant's which had just previously left defendant's station. There was conflicting evidence whether the deceased had control of his horse; whether he struck the horse just before the catastrophe, and whether the engineer of the defendant's train sounded the whistle or rang his bell. There was also conflicting evidence as to the speed of the train, the estimates of witnesses varying from six to twenty-five miles per hour.

The court charged the jury among other things, that "it was an act of negligence, under the circumstances, to be so near the track on which defendant's train was passing, and does not alter the legal conclusion which we have stated in the general charge, and your finding under the circumstances should be for the defendant, and the court so directs."

The verdict was for the defendant and the plaintiff took a writ of error and assigned for error the charge of the court directing a verdict for the defendant.

MR. JUSTICE SHARSWOOD. When the plaintiffs below closed their evidence, they had a perfect *prima facie* case to go to the jury. They had given evidence of the negligence of the defendants, and no contributory negligence of the deceased appeared. The presumption of law was that he had done all that a prudent man would do under the circumstances to preserve his own life, and that he had stopped and looked and listened: *Penna. Railroad Co. v. Weber*, 26 P. F. Smith 157. The onus of proving contributory negligence was thus clearly cast upon the defendants. "It is true," says Mr. Justice Williams, "that when the plaintiff's own evidence discloses contributory negligence there can be no recovery; but if it does not, the burden is on the defendant to disprove care; and in such case the question of negligence is for the jury." It is clear, then, that there was error in the binding direction given by the learned judge to the jury to find for the defendants. The testimony of one witness that Jacob Weiss did not stop, and that he could have seen the train if he had looked, did not justify the court in taking the case from the jury. The fact that the horse the deceased was driving became frightened and unmanageable a short distance from the railroad, if the animal was a gentle one, and was frightened through the negligence of the defendants, and

being beyond the control of the deceased, rushed on the track, was an important element bearing upon the case.

The question of concurring negligence in the deceased, under all the circumstances of the case, should have been submitted to the jury.

Judgment reversed and venire facias de novo awarded.

LESAN v. MAINE CENTRAL RAILROAD COMPANY.

Supreme Court of Maine, January, 1885. 77 Me. 85.

ACTION for negligence. There was a verdict for the plaintiff and the defendants moved to set aside the verdict and for a new trial. The facts are stated in the opinion.

PETERS, C. J. To entitle the plaintiff to recover, he must show, first, that the defendants were guilty of negligence; the injury itself does not import negligence.

Secondly, he must show that their negligence caused the accident. There must be a visible connection of cause and effect. It is not enough to show that the defendants' negligence was adequate and sufficient to cause it—that it might have caused it—he must show that it did cause it; that it was the predominating efficient cause of the accident and injury.

If the accident was caused partly by the plaintiff's own negligence, then it was not, in a legal sense, caused by the negligence of the defendants. In such case, it was caused by both parties. If the result was produced by a commingling of the negligence of the two parties, the plaintiff cannot recover.

Therefore, thirdly, the plaintiff must produce affirmative proof, directly or indirectly, that he was not himself guilty of any negligence which helped cause the accident. Sometimes this is impliedly shown by the proof of the manner of the injury. That is, by proving the defendant's negligence, the same proof may exculpate the plaintiff from any charge of negligence. It may be inferred that a plaintiff was, at the time of an accident, using due care, from the absence of all appearances of fault upon his part in the circumstances under which the accident happened. To state the requirements more precisely, the plaintiff must show affirmatively, or it must affirmatively appear, that he was himself in the use of due care. If it so appears from a full account of the circumstances attending the occurrence, whether the evidence be put in for one purpose or another, then he does affirmatively sustain the burden obligatory upon him.

To illustrate the idea: By the negligence of a railroad company a train of cars runs off the track, whereby passengers are injured. In such a case the passenger, ordinarily situated in the car, who sues for

damages for his injury, would not be required to show any fact further than the occurrence itself. Proof of the accident tells all that can be told, — is, *prima facie* at least, the whole story. *Res ipsa loquitur*. *Stevens v. Railway*, 66 Maine, 74. The injured party is passive in such a case. In the case, however, of a collision between a railroad train and the wagon of a traveller, the traveller plays usually an active part disconnected with or independent of the acts of others, and the acts of the two parties conjunctively produce a collision. In such case not much can be based upon inference and presumption. The prosecuting party must make it distinctly appear that his own remissness did not contribute in causing the injury.

The present case is of the latter description. With the burden of proof on the plaintiff, we think the verdict in his favor should not stand. His conduct seems to have been in no view defensible. He knew the situation of the crossing; was aware that an engine was likely at any time to be upon the track; could have both seen and heard the movement of the engine seasonably to enable him to save himself from injury and testified that he does not know whether he did either or not; was driving rapidly upon a descending grade to the crossing, passing another team on the way; and, when it was too late for either party to avoid the predicament, met with the accident. It was the repetition of an experiment too often made, of taking narrow chances in passing in front of an advancing train. Our very strong belief is, that the absence of whistling or bell-ringing or of signalling of any kind played no material part in causing the accident. When the agents of the company saw that a collision was impending they were helpless to prevent it.

The rule is now firmly established in this state, as well as by courts generally, that it is negligence *per se*, for a person to cross a railroad without first looking and listening for a coming train if there is a chance for doing so.¹ *State v. Maine Central*, 76 Maine, 357. "No neglect of duty on the part of a railroad company will excuse any one approaching such a crossing from using the senses of sight and hearing where these may be available." 1 *Thomp. Neg.* p. 426, and cases in notes. Experience has taught men that there are and can be no safeguards against injuries at railway crossings nearly as efficacious as to look and listen for an approaching train.

The counsel for the plaintiff in an able argument upon the facts of the case, places too much reliance upon his view of the relative rights of the parties in the use of the highway at its crossing with the railroad. At the place of intersection there are, no doubt, concurrent rights. Neither has an exclusive right of passage. They have equal rights. But the manner of exercising those rights is quite another thing. A railroad company would not have the right to occupy the way in a manner or to an extent that would unreasonably delay the

¹ Cf. *Elliott v. Chicago, etc., R. R.*, ante p. 129.

public travel or render it dangerous; nor to start a train at an instant when it would be likely to produce collision. But when a train is under way it has the first right of the road. Its right may then be first exercised. It cannot be required to stop except in cases of apparent danger not otherwise avoidable. The traveller must stop for the train. For that purpose are the requirements of signals and gates and the like to warn the traveller to keep out of the way. There must be a uniform and certain rule to regulate the matter or dire confusion would ensue. The persons running a train have the right of relying upon the supposition that a traveller intends to wait for the passing of the train, unless it appears that he has not a chance to do so.

[The court here discusses the mutual rights of a railroad and a traveller on the highway at railroad crossings and the duty of the railroad to station flagmen at crossings, citing *Continental Improvement Co. v. Stead*, 95 U. S. 161; *Whitney v. Railroad*, 69 Me. 208; *McGrath v. Railroad*, 63 N. Y. 528; *Com. v. Railroad*, 101 Mass. 201; *Houghkirk v. Canal Co.*, 92 N. Y. 219; *Cumberland Valley R. R. v. Mangans*, 23 Am. Law. Reg. N. S. 518 and 1 Thom. Neg. 419].

Motion sustained.

Danforth, Virgin, Foster, Emery and Haskell, JJ., concurred.

NOTE: For a citation and discussion of the conflicting authorities upon the question of the burden of proof of the plaintiff's contributory negligence, see Beach, *Contributory Negligence* (2d edition) chapter XV.

MILLS v. ARMSTRONG.

THE BERNINA.

House of Lords of England, 1888. 13 A. C. 1.

APPEAL from a decision of the Court of Appeal, reported as the *Bernina*, 12 P. D. 58.

The facts appeared in a special case stated for the opinion of the court in three actions in personam brought in the Admiralty Division against the owners of the steamship *Bernina*, who were the appellants in this appeal.

In September, 1884, a collision occurred between the *Bernina* and the steamship *Bushire*, the result of which was that J. H. Armstrong, first engineer of the *Bushire*, T. T. Owen, second officer of the *Bushire*, and M. A. Toeg, a passenger on board the *Bushire*, were drowned. The collision was caused by the fault or default of the master and crew of the *Bushire*.¹ Armstrong and Toeg had nothing to do with the negligent navigation of the *Bushire*, but Owen was in charge of her at the time and was directly responsible for it. The three actions

¹ The collision was caused by the fault of the master and crew of both vessels: see opinion of Lord Herschell, post, p. 209.

were brought by the personal representatives of Armstrong, Owen, and Toeg respectively, to recover damages for their respective deaths.

The questions for the opinion of the court were (1) whether the defendants were liable for the damages sustained in each case, and (2) if liable, whether they were liable to pay the whole of such damages or only a moiety in each case. Butt, J., on the authority of *Thorogood v. Bryan*, 8 C. B. 115, pronounced that the defendants were not liable in any of the actions. 11 P. D. 31. The Court of Appeal reversed this decision so far as it concerned the actions by the representatives of Armstrong and Toeg, and pronounced that the defendants were liable in those two actions for the damages proceeded for, and referred the amount to the registrar; being of opinion that *Thorogood v. Bryan* was wrongly decided; that the actions were not admiralty actions; and therefore that the admiralty rule as to half damages did not apply to them. 12 P. D. 58, 83, 84, 95.

Before the Court of Appeal the claim on behalf of Owen's representatives was given up, and the respondents in the appeal to this House consisted only of the representatives of Armstrong and Toeg respectively. The question upon the admiralty rule as to half damages was mentioned by the appellant's counsel but was not argued before this House.

LORD HERSCHELL. My lords, this appeal arises upon a special case stated in actions in which the respondents are plaintiffs. They are both actions brought under Lord Campbell's Act to recover damages against the appellants for the loss sustained owing to the deaths of the persons of whom the respondents are the personal representatives, and who, it is alleged, lost their lives through the negligence of the appellants.

The appellants are the owners of the steamship *Bernina*, between which vessel and the steamship *Bushire* a collision took place, which led to the loss of fifteen persons who were on board the latter vessel. It is admitted that the collision was caused by the fault or default of the master and crew of both vessels. J. H. Armstrong, whose administratrix one of the respondents is, was a member of the crew of the *Bushire*, but had nothing to do with its careless navigation. M. A. Toeg, of whom the other respondent is administratrix, was a passenger on board the *Bushire*.

The question arises whether, under these circumstances, the appellants are liable. The appellants having, as they admit, been guilty of negligence from which the respondents have suffered loss, a *prima facie* case of liability is made out against them. How do they defend themselves? They do not allege that those whom the respondents represent were personally guilty of negligence which contributed to the accident. Nor again do they allege that there was contributory negligence on the part of any third person standing in such a legal relation towards the deceased men as to cause the acts of that third

person, on principles well settled in our law, to be regarded as their acts, as e. g. the relation of master and servant or employer and agent acting within the scope of his authority. But they rest their defence solely upon the ground that those who were navigating the vessel in which the deceased men were being carried were guilty of negligence without which the disaster would not have occurred. In support of the proposition that this establishes a defence they rely upon the case of *Thorogood v. Bryan*, 8 C. B. 115, which undoubtedly does support their contention.

This case was decided as long ago as 1849, and has been followed in some other cases; but though it was early subjected to adverse criticism, it has never come for revision before a court of appeal until the present occasion. That action was one brought under Lord Campbell's Act, against the owner of an omnibus by which the deceased man was run over and killed. The omnibus in which he had been carried had set him down in the middle of the road instead of drawing up to the kerb, and before he could get out of the way he was run over by the defendant's omnibus, which was coming along at too rapid a pace to be able to pull up. The learned judge directed the jury that "if they were of opinion that want of care on the part of driver of Barber's omnibus in not drawing up to the kerb to put the deceased down, or any want of care on the part of the deceased himself, had been conducive to the injury, in either of those cases — notwithstanding the defendant, by her servant, had been guilty of negligence — their verdict must be for the defendant." The jury gave a verdict for the defendant, and the question was then raised, on a rule for a new trial on the ground of misdirection, whether the ruling of the learned judge was right. The court held that it was.

It is necessary to examine carefully the reasoning by which this result was arrived at. Coltman, J., said: "It appears to me that having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants that if any injury results from their negligence he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he was travelling that want of care of the driver will be a defence of the driver of the carriage which directly caused the injury." Maule and Vaughan Williams, JJ., also dwelt upon this view of the identification of the passenger with the driver of the vehicle in which he is being carried. The former thus expressed himself: "I incline to think that, for this purpose, the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased." Vaughan Williams, J., said: "I think the passenger must for this purpose be considered as identified with the person having the management of the omnibus he was conveyed by."

With the utmost respect for these eminent judges, I must say that I am unable to comprehend this doctrine of identification upon which they lay so much stress. In what sense is the passenger by a public stage-coach, because he avails himself of the accommodation afforded by it, identified with the driver? The learned judges manifestly do not mean to suggest (though some of the language used would seem to bear that construction) that the passenger is so far identified with the driver that the negligence of the latter would render the former liable to third persons injured by it. I presume that they did not even mean that the identification is so complete as to prevent the passenger from recovering against the driver's master; though if "negligence of the owner's servants is to be considered negligence of the passenger," or if he "must be considered a party" to their negligence, it is not easy to see why it should not be a bar to such an action. In short, as far as I can see, the identification appears to be effective only to the extent of enabling another person whose servants have been guilty of negligence to defend himself by the allegation of contributory negligence on the part of the person injured. But the very question that had to be determined was, whether the contributory negligence of the driver of the vehicle was a defence as against the passenger when suing another wrongdoer. To say that it is a defence because the passenger is identified with the driver, appears to me to beg the question, when it is not suggested that this identification results from any recognized principles of law, or has any other effect than to furnish that defence the validity of which was the very point in issue. Two persons may no doubt be so bound together by the legal relation in which they stand to each other that the acts of one may be regarded by the law as the acts of the other. But the relation between the passenger in a public vehicle and the driver of it certainly is not such as to fall within any of the recognized categories in which the act of one man is treated in law as the act of another.

I pass now to the other reasons given for the judgment in *Thoroughgood v. Bryan*. Maule, J., says: "On the part of the plaintiff it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. . . . But, as regards the present plaintiff, he is not altogether without fault; he chose his own conveyance, and must take the consequences of any default on the part of the driver whom he thought fit to trust."

I confess I cannot concur in this reasoning. I do not think it well founded either in fact or in law. What kind of control has the passenger over the driver which would make it reasonable to hold the former affected by the negligence of the latter? And is it any more

reasonable to hold him so affected because he chose the mode of conveyance, that is to say, drove in an omnibus rather than walked or took the first omnibus that passed him instead of waiting for another? And when it is attempted to apply this reasoning to passengers travelling in steamships or on railways, the unreasonableness of such a doctrine is even more glaring.

The only other reason given is contained in the judgment of Cresswell, J., in these words: "If the driver of the omnibus the deceased was in had by his negligence or want of due care and skill contributed to an injury from a collision, his master clearly could maintain no action. And I must confess I see no reason why a passenger who employs the driver to convey him stands in any better position." Surely, with deference, the reason for the difference lies on the very surface. If the master in such a case could maintain no action, it is because there existed between him and the driver the relation of master and servant. It is clear that if his driver's negligence alone had caused the collision, he would have been liable to an action for the injury resulting from it to third persons. The learned judge would, I imagine, in that case have seen a reason why a passenger in the omnibus stood in a better position than the master of the driver. I have now dealt with all the reasons on which the judgment in *Thorogood v. Bryan* was founded, and I entirely agree with the learned judges in the court below in thinking them inconclusive and unsatisfactory.

I will not detain your lordships further on this part of the case beyond saying that I concur with the judgments of the learned judges in the court below, and specially with the very exhaustive judgment of the Master of the Rolls.

It was suggested in the course of the argument that *Thorogood v. Bryan* might be supported on the ground that the allegation that the negligence which caused the injury was the defendant's was not proved, inasmuch as it was the defendant's negligence in conjunction with that of the driver of the other omnibus. It may be that, as a pleading point, this would have been good. It is not necessary to express an opinion whether it would or not. I do not think it would have been a defence on the merits if the facts had been properly averred. If by a collision between two vehicles a person unconnected with either vehicle were injured, the owner of neither vehicle when sued could maintain as a defence, "I am not guilty, because but for the negligence of another person the accident would not have happened." And I do not see how this defence is any more available as against a person being carried in one of the vehicles, unless the reasoning in *Thorogood v. Bryan* be well founded.

I have said that the decision in *Thorogood v. Bryan* has not been unquestioned. I do not think it necessary to enter upon a minute consideration of the subsequent cases, after the careful and accurate

examination to which they have been subjected by the Master of the Rolls. The result may be summarized thus: The learned editors of Smith's Leading Cases,¹ Willes and Keating, JJ., strongly questioned the propriety of the decision. Parke, B., whose dictum in *Bridge v. Grand Junction Ry. Co.*, 3 M. & W. 244, Williams, J., followed in directing the jury in *Thorogood v. Bryan*, appears to have doubted the soundness of the judgment in that case. Dr. Lushington, in *The Milan*, Lush. 388, expressed strong disapproval of it; and though in *Armstrong v. Lancashire & Yorkshire Ry. Co.*, L. R. 10 Ex. 47, it was followed, and Bramwell and Pollock, BB., to say the least did not indicate dissatisfaction with it, I understand that my noble and learned friend Lord Bramwell, after hearing this case argued, and maturely considering it, agrees with the judgment of the court below. In Scotland the decision in *Thorogood v. Bryan* was pronounced unsatisfactory, in *Adams v. Glasgow & Southwestern Ry. Co.*, 3 Ct. Sess. Cas. 4th Ser. 215. In America it has been followed in the courts of some States, but it has often been departed from, and upon the whole the view taken has been decidedly adverse to it. The latest case that I am aware of in that country is *Little v. Hackett*, 116 U. S. 366. That was a decision of the Supreme Court of the United States, whose decisions, on account of its high character for learning and ability, are always to be regarded with respect. Field, J., in delivering judgment examined all the English and American cases, and the conclusion adopted was the same as that at which your lordships have arrived.

I have only this observation to add. The case of *Waite v. North-eastern Ry. Co.*, E., B. & E. 719, was much relied on in the argument for the appellants; but the very learned counsel who argued that case for the defendants, and all the judges who took part in the decision, were of opinion that it was clearly distinguishable from *Thorogood v. Bryan*, and did not involve a review of that case. I think they were right.

As regards the other questions raised, I have only to say that I think they were properly dealt with by the court below.

I am requested by my noble and learned friend Lord Bramwell, who was unable to remain to read the opinion which he had prepared, to state that he concurs in the motion which I am about to make.²

Lord Watson delivered a concurring opinion.

Lord Macnaghten concurred.

Order appealed from, affirmed, &c.

¹In notes to *Ashby v. White*.

²Lord Bramwell, in his opinion, treated the question in *Thorogood v. Bryan* as turning upon the pleading, and in that aspect as right. The special plea in regard to the defendant's negligence had not, said his lordship, been proved. The plea alleged defendant's negligence alone; the proof showed, not joint negligence by two persons, but two separate acts of negligence.

WARREN, ADM'R, *v.* MANCHESTER STREET RAILWAY.

Supreme Court of New Hampshire, June, 1900. 70 N. H. 352.

CASE, for negligence. Verdict for the plaintiff. The defendants, while running an electric car in a public street in Manchester, struck and killed the intestate, an infant three years old, who had left his home unobserved, ten minutes before the accident. His mother was ill in bed, and his father was away at work. The plaintiff's evidence tended to prove the following facts: When the car was about fifty feet from the place of the accident, the child was within four or five feet of the track, walking slowly toward it. Apparently the motor-man did not notice him. The car was running twelve to fifteen miles an hour, and the motor-man did not put on the brake in season to avoid the injury. The accident occurred on the afternoon of a summer day, and there was no obstruction to prevent the motor-man from discovering the child sooner than he did. The car had no fender attached to it. If there had been one, the danger of injury would have been much less.

The defendants' evidence tended to prove that the child started suddenly from the side of the street to cross the track, when the car was nearly opposite to him, and that the motor-man, on account of excitement, failed to reverse the power.

Subject to the defendants' exception, the intestate's father was not allowed to testify upon cross-examination whether or not he permitted the interstate to go out unattended. The defendants excepted to the refusal of the court to instruct the jury as follows:

1. If you find that the child strayed into the street by reason of the negligence of its parents, and this contributed to the injury, the plaintiff cannot recover.

2. If you find that the motor-man was acting under excitement at the time of the accident, and by reason thereof erred in what he did, — that is, used the brake when he ought to have used the reverse, — it was not negligence.

3. If you find that the motor-man, up to the time of the accident, was in the exercise of due care, and that when he saw the danger the child was in he acted under the influence of sudden excitement, and on that account erred in judgment by using the brake instead of the reverse lever, his conduct in so doing was not negligence.

4. If you find that such a fender as the defendants could have conveniently used upon the car at the time of the accident probably would not have saved the life of the child, the absence of it was not negligence and cannot be considered in determining the question of the defendants' liability.

The court instructed the jury in part as follows: "It was the duty

of the defendants to use due care to select competent servants to manage their cars, and if they failed to exercise such care, they were negligent. . . . It was the duty of the defendants to equip their cars with such safety appliances as men of average prudence would use under the same circumstances. They were not bound to adopt all such devices as are put upon the market; but if they failed to use such safety appliances as reasonably prudent men would use in the same circumstances, they were negligent." Subject to the defendants' exception, the court refused to qualify these instructions by adding, "if the failure to make the proper election of servants or furnish the proper appliances contributed to the accident or injury," for the reason that the qualification asked for was contained in another part of the charge.

PIKE, J. The defendants' exceptions to the court's refusals to permit the father to testify whether he allowed his child to go out unattended, and to instruct the jury that if the child strayed into the street in consequence of the parents' negligence, and this negligence contributed to cause the injury, the plaintiff could not recover, raise the questions (1) whether a parent's negligence is imputable to his child, and (2) whether the father of the intestate is the real plaintiff in this action.

Had the negligence relied upon been that of the motor-man solely, it would be unnecessary to consider these questions; for in that event the father's negligence must have been only a remote cause of the injury, and therefore would be immaterial to the plaintiff's right to recover. The effect of this negligence would have been only to allow the child to be in a dangerous situation. The father's absence would have rendered it impossible for him to avoid the injury at the time. "He who cannot prevent an injury negligently inflicted upon his person or property by an intelligent agent 'present and acting at the time' . . . is legally without fault, and it is immaterial whether his inability results from his absence, previous negligence, or other cause." *Nashua Iron and Steel Co. v. Railroad*, 62 N. H. 159, 163; *Felch v. Railroad*, 66 N. H. 318; *Brember v. Jones*, 67 N. H. 374, 376, 377; *Brown v. Savings Bank*, 67 N. H. 549, 551; *Chickering v. Lord*, 67 N. H. 555, 557; *Edgerly v. Railroad*, 67 N. H. 312, 314, 315, 317. The question for the jury would have been whether or not the defendants by the exercise of ordinary care could have prevented the injury; if they could not, they would have been without fault and not liable; if they could, they would have been "liable whether the intestate was in the street by reason of, or without, his parents' negligence. In cases of this character, where an irresponsible child is, . . . by the negligence of the parent, . . . exposed to peril without an attendant, . . . the question of contributory negligence is not involved." *Bisaillon v. Blood*, 64 N. H. 565, 566.

There was, however, other evidence of the defendants' negligence

in their failure to provide a fender for the car. If they had provided one, the intestate might not have been injured. This negligence was due to non-action of the defendants at some previous time. It was negligence that occurred in the past, the effect of which the defendants could not avoid at the moment of the accident by the exercise of ordinary care. If, therefore, the father's negligence is imputable to the child, or the father is the real plaintiff, his negligence in allowing the child to stray upon the track was material if it contributed to the injury. *Nashua Iron and Steel Co. v. Railroad*, 62 N. H. 159, 165.

The question whether a parent's negligence can be imputed to his child, so as to bar a recovery by the child against a third person, has been considered by the courts of many states, and conflicting conclusions have been reached. The question first arose in *Hartfield v. Roper*, 21 Wend. 615, where it was decided in the affirmative. The court said: "An infant is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and in respect to third persons, his act must be deemed that of the infant; his neglect, the infant's neglect." This rule was questioned in Vermont soon after its announcement, and has been rejected quite generally elsewhere. In *Robinson v. Cone*, 22 Vt. 213, 224, Redfield, J., said: "We are satisfied, that although a child, or idiot, or lunatic may to some extent have escaped into the highway through the fault or negligence of his keeper, and so be improperly there, yet if he is hurt by the negligence of the defendant, he is not precluded from his redress." In *Smith v. O'Connor*, 48 Pa. St. 218, 221, the court said: "We are asked to approve and apply the doctrine held by the New York courts, and first enunciated in *Hartfield v. Roper*, 21 Wend. 615. There it is ruled that the negligence or imprudence of the parents or guardians in allowing a child of tender age to be exposed to injury in a highway furnishes the same answer to an action by the child as the negligence or other fault of an adult plaintiff would in a similar case. The negligence of the parents or guardians is imputed to the child, and hence, unless the infant plaintiff has exercised that care and prudence which are demanded of an adult, unless equally guiltless of any negligence concurring with a wrongful act of a defendant in causing an injury, no action can be sustained. This is compelling the child to the exercise, not of its own, but of its parents' discretion. It is holding it responsible for the ordinary care of adults. In our opinion, the rule thus broadly stated does not rest upon sound reason." In *Bellefontaine, etc., R. R. v. Snyder*, 18 Ohio St. 399, 409, it was said: "It is the old doctrine of the father eating grapes, and the child's teeth being set on edge. The strong objection to it is its palpable injustice to the infant. Can it be true, and is such the law, that if only one party offends against an infant he has

his action, but that if two offend against him their faults neutralize each other, and he is without remedy?" In *Newman v. Railroad*, 52 N. J. Law 446, 449, 450, Beasley, C. J., said: "This doctrine of the imputability of the misfeasance of the keeper of a child to the child itself is deemed to be a pure interpolation into the law, for until the case under criticism it was absolutely unknown; nor is it sustained by legal analogies. Infants have always been the particular objects of the favor and protection of the law. In the language of an ancient authority this doctrine is thus expressed: 'The common principle is that an infant in all things which sound in his benefit shall have favor and preferment in law as well as another man, but shall not be prejudiced by anything in his disadvantage.' 9 Vin. Abr. 374. And it would appear to be plain that nothing could be more to the prejudice of an infant than to convert, by construction of law, the connection between himself and his custodian into an agency to which the harsh rule of respondeat superior should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen, with some propriety, from the circumstances that the creation of the agency is a voluntary act, and that it can be controlled and ended at the will of its creator. But in the relationship between the infant and its keeper all these decisive characteristics are wholly wanting. The law imposes the keeper upon the child, who, of course, can neither control nor remove him, and the injustice, therefore, of making the latter responsible in any measure whatever for the torts of the former would seem to be quite evident. Such subjectivity would be hostile in every respect to the natural rights of the infant, and consequently cannot, with any show of reason, be introduced into that provision which both necessity and law establish for his protection. Nor can it be said that its existence is necessary to give just enforcement to the rights of others. When it happens that both the infant and its custodian have been injured by the co-operative negligence of such custodian and a third party, it seems reasonable, at least in some degree, that the latter should be enabled to say to the custodian, 'You and I, by our common carelessness, have done this wrong, and therefore neither can look to the other for redress;' but when such wrongdoer says to the infant, 'Your guardian and I, by our joint misconduct, have brought this loss upon you, consequently you have no right of action against me, but you must look for indemnification to your guardian alone,' a proposition is stated that appears to be without any basis either in good sense or law. The conversion of the infant, who is entirely free from fault, into a wrongdoer, by imputation, is logical contrivance uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this: an infant of tender years cannot be charged with negligence; nor can he be so charged with the commission of such fault by sub-

stitution, for he is incapable of appointing an agent, the consequence being that he can in no case be considered to be the blamable cause, either in whole or in part, of his own injury."

It has never been held in this state that the negligence of one person is imputable to another, unless the former was the servant or agent of the latter. *Noyes v. Boscawen*, 64 N. H. 361. Apparently, the doctrine of *Hartfield v. Roper* was based upon the assumption that the custodian of the infant was his agent. Such an assumption is clearly erroneous, for no such agency can exist in fact. All the elements of agency are wanting. The infant neither appoints his custodian nor has power or capacity to remove him. Such a "custodian is the agent, not of the infant, but of the law. If such supposed agency existed, it would embrace many interests of the infant, and could not be confined to the single instance where an injury is inflicted by the co-operative tort of the guardian. And yet it seems certain that such custodian cannot surrender or impair a single right of any kind that is vested in the child, nor impose any legal burthen upon it. If a mother, travelling with her child in her arms, should agree with a railway company that, in case of an accident to such infant by reason of the joint negligence of herself and the company, the latter should not be liable to a suit by the child, such an engagement would be plainly invalid on two grounds,—first, the contract would be contra bonos mores, and, second, because the mother was not the agent of the child authorized to enter into the agreement. Nevertheless, the position has been deemed defensible that the same evil consequences to the infant will follow from the negligence of the mother, in the absence of such supposed contract, as would have resulted if such contract should have been made and should have held valid." *Newman v. Railroad*, 52 N. J. Law 446, 448.

The reasons which prevent an adult from a recovery for injuries which his negligence contributed to produce are (1) "The mutuality of the wrong, entitling each party alike, where both are injured, to his action against the other, if it entitles either; (2) the impolicy of allowing a party to recover for *his own* wrong; and (3) the policy of making the personal interests of parties dependent upon their own prudence and care. All these are wanting in the case of the infant plaintiff." *Bellefontaine, etc., R. R. v. Snyder*, 18 Ohio St. 399, 409. If negligence of a parent can be imputed to prevent a child's recovery for its injury, it follows that it can also be imputed to render the child liable in damages; but such is not the law. "It is difficult to perceive what principle of public policy is to be subserved, or how it can be reconciled with justice to the infant, to make his personal rights dependent upon the good or bad conduct of others." *Bellefontaine, etc., R. R. v. Snyder*, supra, 409.

The doctrine of *Hartfield v. Roper* imposes burdens and hardships

upon the helpless infant that are manifestly unjust. It is opposed by the great weight of modern authorities, and by sound judicial reason. *Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371, 374; *Railway Co. v. Rexroad*, 59 Ark. 180, 185; *Daley v. Railroad*, 26 Conn. 591, 598; *Moore v. Railroad*, 2 Mackey 437, 449; *Chicago, etc., Co. v. Wilcox*, 138 Ill. 370, 373; *Evansville v. Senhenn*, 151 Ind. 42; *Wymore v. County*, 78 Ia. 396, 397; *Missouri, etc., R'y v. Shockman*, 59 Kan. 774; *South Covington, etc., R'y v. Herrklotz*, 47 S. W. Rep. 265 (Ky. 1898); *Westerfield v. Levis*, 43 La. 63; *Shippy v. Au Sable*, 85 Mich. 280, 292; *Westbrook v. Railroad*, 66 Miss. 560, 568; *Winters v. Railway*, 99 Mo. 509, 519; *Huff v. Ames*, 16 Neb. 139, 142; *Bottoms v. Railroad*, 114 N. C. 699, 706; *Erie, etc., R'y v. Schuster*, 113 Pa. St. 412, 416; *Whirley v. Whiteman*, 1 Head 610, 619; *Norfolk, etc., R. R. v. Ormsby*, 27 Grat. 455, 476; *Roth v. Company*, 13 Wash. 525, 545; *Dicken v. Company*, 41 W. Va. 511. It is not in harmony with the principles of the law of this state, and is not adopted as a part of its jurisprudence.

"Actions of tort for physical injuries to the person . . . and the causes of such actions shall survive to the extent and subject to the limitations set forth in the five following sections, and not otherwise." P. S., c. 191, s. 8.

"In such case, the damages recovered, less the expenses of recovery, shall belong and be distributed as follows:

"I. To the widow or widower of the deceased one half thereof, and to the children of the deceased the other half in equal shares.

"II. If there be no child, to the widow or widower the whole thereof.

"III. If there be no child and no widow or widower, to the heirs-at-law of the deceased according to the laws of distribution." *Ib.*, s. 13.

"IV. If there be a child or children and no widow or widower, to the children of the deceased in equal shares the whole thereof." Laws 1893, c. 67, s. 5.

This action, brought by the administrator of the child's estate, is for the benefit of the estate and not, as the defendants claim, for the benefit of the father. The fact that the father will be indirectly benefited is only an incident of the suit. Had the child survived, the action would have been brought in its own name. The father's cause of action would have been what it is now, — case for the loss of the child's service. The child's cause of action survived by reason of the statute, and the money recovered in it will be assets in the hands of its administrator, to be distributed in accordance with the special provisions of the statute. If the father's negligence barred his right to recover in this action there would seem to be no reason why it would not bar him from recovering any property of the child which he might inherit under the general provisions relating to descent and distribution; but this is not claimed to be and is not

the law. The evidence of the father's negligence was properly excluded, and the request for instructions upon this point was properly denied.

The second and third requests were also properly denied. Even if the motor-man was acting under excitement when the accident occurred, and because thereof erred in judgment in his efforts to stop the car, it does not follow that he was in the exercise of ordinary care. It was for the jury to say whether "a person of average prudence," situated as the motor-man was, "possessed of the same knowledge and means of knowledge that he had of the surrounding circumstances," including his excitement, the "impending danger, and means of avoiding it, would or might have done as he did." *Folsom v. Railroad*, 68 N. H. 454, 460. The motor-man's excitement was only one of several circumstances from which the question of his negligence was to be determined.

The defendants' duty to equip their car with safety appliances was not limited by their convenience, but included the adoption of such appliances as men of average prudence would use under the same circumstances. In any event, as the plaintiff says, "the defendants were not harmed by the court's refusal to charge in accordance with the fourth request. Assume that the jury found that the fender described in the request probably would not have saved the child; that necessarily involved a finding that the absence of it probably did not kill him or contribute to his injury. Hence the jury could not have placed its verdict upon the ground of this default, having been instructed that the defendants' negligence in any particular must contribute to the injury to warrant a recovery."

The court, having instructed the jury correctly, was not bound to give the special instructions asked for by the defendants. "It must necessarily be left to the presiding justice to decide how far it would be useful to accompany a statement of legal propositions with observations upon the facts of the case." *Davis v. Railroad*, 68 N. H. 247, 252.

The refusal of the court to qualify his instructions when the qualification was contained in another part of the charge raises no question of law. Such refusal was within the discretion of the presiding judge. *Davis v. Railroad*, supra.

Exceptions overruled.

YOUNG, J., did not sit: the others concurred.

NOTE: See *Atlanta & Charlotte Air-Line Ry. Co. v. Gravitt*, 93 Ga. 369, reviewing the authorities upon the question of imputed negligence. See also *Bigelow on Torts*, 8th ed. p. 194 et seq.

MALICE.

CHAPTER IV.

SLANDER OF TITLE.

MALACHY *v.* SOPER.

Common Pleas of England, Michaelmas Term, 1836. 3 Bing. N. C. 371.

ACTION for damages for false statements in a newspaper published by defendants, in regard to two suits in chancery against the plaintiff, to both of which the plaintiff had filed demurrers. The declaration alleged that the plaintiff was owner of shares of stock in a certain mine; that certain claimants to said shares had filed a bill in chancery disputing the plaintiff's right to the same, to which bill the plaintiff had demurred; that the defendants, well knowing the premises, and contriving, and wickedly and maliciously intending, to injure the plaintiff in his said rights, and to cause it to be suspected and believed that the said shares of the plaintiffs were of little or no value, and that the plaintiff had no right to use or work the said mine as aforesaid, and to hinder and prevent the plaintiff from selling or disposing of his said shares, and from deriving or acquiring from the said mine any more profits, emoluments, or advantages whatever, and also to vex, harass, oppress, impoverish, and wholly ruin the plaintiff, to wit, on the 2d of January, 1836, wrongfully and unjustly did publish, and cause and procure to be published, a certain false, malicious, and unfounded libel in a certain public newspaper, of and concerning the plaintiffs and his said shares, and the said using and working of the said mine, and of and concerning the aforesaid suits, bills, and demurrers, that is to say: "Wheal Brothers silver mine (meaning the said mine); Tollervey *v.* Malachi (meaning the first-mentioned suit), and Hayward *v.* Malachi (meaning the second-mentioned suit); in these cases (meaning the said two suits) which arose out of disputes relating to the celebrated silver mine, Wheal Brothers, in the parish of Calstock (meaning the said mine), and which have been brought into the court of the Vice-Chancellor, the learned judge, after hearing long arguments, and a multitude of affidavits, has set aside the demurrers (meaning the said demurrers), and granted the prayer of the petition (meaning the prayer of the petition in each of the said bills as aforesaid, for an account and an injunction), and persons duly authorized have arrived on the workings" (meaning the workings

of the said mine); thereby then meaning that the said several demurrers had been set aside by the said court, and that the prayer of the said petition on each of the said bills for an account and injunction had been granted by the said court, and that persons duly authorized by the said court had arrived on the workings of the said mine, and were hindering and preventing the said mine from being used and worked as it was before the committing of the grievance, and as the same would have continued to have been, in so ample and beneficial a manner for the plaintiff, and others, the holders of shares in the said mine; whereas, in truth and in fact, at the time of the committing of the grievance, the said demurrers had not, nor had either of them, been set aside by the said court, nor had the prayer of the said petition, on each of the said bills, for an account and injunction been granted by the said court; and whereas in truth and in fact, at the time of the committing of the grievance, no person or persons, duly authorized by the said court, had carried on the workings of the said mine, nor was nor were any person or persons hindering or preventing the said mine from being used and worked as it had been before this committing of the said grievance, and as the same would have continued to have been, in so ample and beneficial a manner for the plaintiff, and others, the holders of shares in the said mine. By means of which said several premises the plaintiff had been and was greatly injured in his said rights; and the said shares so possessed by him, and in which he was interested as aforesaid, became and were much depreciated and lessened in value, to wit, in the value of £50, on and in respect of each of such shares, and divers persons had believed, and still did believe, that the plaintiff had little or no right to the said shares, and that the said mine could not lawfully be worked or used for the benefit of the plaintiff; and the plaintiff had been hindered and prevented from selling or disposing of his said shares in the said mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done; and the plaintiff had been otherwise hindered and prevented from gaining, acquiring, or deriving profits, emoluments, benefits, and advantages which otherwise would have arisen and accrued to him from the same; and also, by reason of the premises aforesaid, the plaintiff had been and was otherwise much damnified and injured.

A verdict having been obtained for the plaintiff on this declaration, damages £5, a rule nisi, to arrest the judgment, was obtained on the ground that there was no allegation or proof of special damage.

TINDAL, C. J. In this case a verdict having been found for the plaintiff at the trial of the cause, with £5 damages, a motion has been made to arrest the judgment on the ground that the declaration does not state any legal cause of action; and we are of opinion that this objection is well founded, and that the judgment must be arrested.

This is not an ordinary action for defamation of the person, by the

publication of slander, either oral or written, in which form of action no special damage need either be alleged or proved, the law presuming that the uttering of the slanderous words, or the publishing of the libel, have of themselves a natural and necessary tendency to injure the plaintiff. But this is an action to recover damages by reason of the publication of a paragraph in a newspaper, which contains no other charge than that the petition in a bill filed in the Court of Chancery against the plaintiff, and certain other persons as share-owners in a certain mine, for an account and an injunction, had been granted by the Vice-Chancellor, and that persons duly authorized had arrived in the workings. The publication, therefore, is one which slanders not the person or character of the plaintiff, but his title as one of the shareholders to the undisputed possession and enjoyment of his shares of the mine. And the objection taken is, that the plaintiff, in order to maintain this action, must show a special damage to have happened from the publication, and that this declaration shows none.

The first question, therefore, is, Does the law require in such an action an allegation of special damage? And, looking at the authorities, we think they all point the same way. The law is clearly laid down in *Sir W. Jones*, 196 (*Lowe v. Harewood*). "Of slander of title, the plaintiff shall not maintain action unless it was *re vera* a damage, scil., that he was hindered in sale of his land; so there the particular damage ought to be alleged." And in addition to the cases cited at the bar, viz., *Sir John Tasburgh v. Day*, Cro. Jac. 484, and *Manning v. Avery*, 3 Keb. 153, the case of *Cane v. Golding*, Style's Rep. 169, 176, furnishes a strong authority. That was an action on the case for slandering the plaintiff's title, by speaking these words, viz., "His right and title thereunto is nought, and I have a better title than he." The words were alleged to be spoken *falso et malitiose*, and that he was likely to sell and was injured by the words; and that by reason of speaking the words he could not recover his titles. After verdict for the plaintiff, there was a motion in arrest of judgment; and Rolle, C. J., said, "There ought to be a scandal and a particular damage set forth, and there is not here;" and upon its being moved again and argued by the judges, Rolle, C. J., held, that the action did not lie, although it was alleged that the words were spoken *falso et malitiose*, for "the plaintiff ought to have a special cause; but that the verdict might supply; but the plaintiff ought also to have showed a special damage, which he hath not done, and this the verdict cannot supply. The declaration here is too general, and upon which no good issue can be joined; and he ought to have alleged that there was a communication had before the words spoken touching the sale of the lands whereof the title was slandered, and that by speaking of them the sale was hindered;" and cited several cases to that effect.

We hold, therefore, on the authority of these cases, that an action for slander of title is not properly an action for words spoken or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title. This action is ranged under that division of actions in the Digests and other writers on the text law, and such we feel bound to hold it to remain at the present day.

The next question is, Has there been such a special damage alleged in this case as will satisfy the rule laid down by the authorities above referred to? The doctrine of the older cases is, that the plaintiff ought to aver that, by the speaking, he could not sell or lease (*Cro. Eliz.* 197, *Cro. Car.* 140); and that it will not be sufficient to say only, that he had an intent to sell, without alleging a communication for sale. *R. 1, Rolle*, 244. Admitting, however, that these may be put as instances only, and that there may be many more cases in which a particular damage may be equally apparent without such allegation, they establish at least this, that in the action for slander of title there must be an express allegation of some particular damage resulting to the plaintiff from such slander. Now the allegation upon this record is only this, "that the plaintiff is injured in his rights, and the shares so possessed by him, and in which he is interested, have been and are much depreciated and lessened in value; and divers persons have believed and do believe that he has little or no right to the shares, and that the mine cannot be lawfully worked or used for his benefit; and that he hath been hindered and prevented from selling or disposing of his said shares in the said mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done." And we are of opinion that this is not such an allegation of special damage as the authorities above referred to require, where the action is not founded on the words spoken or written, but upon the special damage sustained.

It has been argued in support of the present action that it is not so much an action for slander of title, as an action for a libel on the plaintiff in the course of his business, and in the way of gaining his livelihood, and that such an action is strictly and properly an action for defamation, and so classed and held by all the authorities. But we think it sufficient to advert to the declaration, to be convinced that the publication complained of was really and strictly a slander of the plaintiff's title to his shares, and nothing else. The bill in chancery, out of which the publication arose, is filed by Tollervey, who disputed the plaintiff's right to the whole of the shares, and claimed in himself a right to part of the same, and prayed that he might be declared to be entitled to some of them; and the only mention made as to the working of the mines was with reference to the appointment of a receiver to the profits thereof. And we think it would be doing violence to the natural meaning of the terms of the publication, if we

were to hold it to be published of the plaintiff in the course of his business or occupation or mode of acquiring his livelihood, and not as referring to the disputed title of the shares of the mine.

It has been urged, secondly, that however necessary it may be, according to the ancient authorities, to allege some particular damage in cases of unwritten slander of title, the case of written slander stands on different grounds; and that an action may be maintained without an allegation of damage actually sustained, if the plaintiff's right be impeached by a written publication, which of itself, it is contended, affords presumption of injury to the plaintiff. No authority whatever has been cited in support of this distinction. And we are of opinion that the necessity for an allegation of actual damage in the case of slander of title cannot depend upon the medium through which that slander is conveyed, that is, whether it be through words or writing or print; but that it rests on the nature of the action itself, namely, it is an action for special damage actually sustained, and not an action for slander. The circumstance of the slander of title being conveyed in a letter or other publication, appears to us to make no other difference than that it is more widely and permanently disseminated, and in consequence more likely to be serious than where the slander of title is by words only, but that it makes no difference whatever in the legal ground of action.

For these reasons we are of opinion that the action is not maintainable, and that the judgment must be arrested; and consequently it becomes unnecessary to inquire whether the innuendo laid in the declaration is more large than it ought to have been.

We therefore make the rule for arresting the judgment

*Absolute.*¹

GOTT v. PULSIFER.

Supreme Court of Massachusetts, March, 1877. 122 Mass. 235.

TORT. The declaration alleged that, at the time of the publication hereinafter referred to, the plaintiff was the owner of a certain stone figure or image, being or resembling a colossal statue of a man, which statue, figure or image was formerly exhumed at Cardiff in the State of New York, and was publicly known as the "Cardiff Giant" or "Onondaga Statue;" that the statue was of great value to the plaintiff as a scientific curiosity and for the purpose of exhibiting the same as such curiosity, and had long been a source of great gain and profit to the plaintiff by exhibiting the same as a public show; that the defendants were on November 13, 1873, the proprietors and publishers of a certain newspaper published in Boston, to wit. the Sunday Herald; that on that day the defendants published in their

¹ See *White v. Mellin*, 1895, A. C. 154, House of Lords.

said paper a certain false, scandalous and malicious libel of and concerning the plaintiff, and of and concerning his said property, to wit, his said statue, figure or image, in the words following:

"The sale of the Cardiff Giant, so called, at New Orleans, for the small price of eight dollars, recalls the palmy days of that ingenious humbug. We well remember the learned remarks made by connoisseurs in this city when it was exhibited in a vacant store quite near our office. While the vulgar herd only looked on in silence, seeing a colossal figure which excited their curiosity, but which they did not attempt to explain, the Harvard professors and other learned men traced its pedigree by their knowledge of artistic history, and constructed theories as to its origin, which at once displayed their erudition, and helped to advertise the show. But our professors and learned men were not the only victims of the sell. A distinguished professor of Yale discussed learnedly upon it in the *Galaxy Magazine*. He demonstrated beyond a doubt that the statue was authentic, that it was antique, and that it was a colossal monolith. He ciphered it down that it was a Phœnician image of the god Baal, and found no difficulty in proving to his own satisfaction that it was brought to America by a Phœnician party of adventurers, who sailed in one of the ships of Tarshish, and that it was buried by the idolaters to save it from desecration by the hordes of savages who overpowered and destroyed the Phœnicians. He accounted for several marks and symbols upon the image, which were unmistakably Phœnician. Not long afterwards the man who brought the colossal monolith to light confessed that it was a fraud, and the learned gentlemen, who had indorsed its authenticity, were left as naked as the statue itself."

The declaration then alleged that the statue had never been sold in New Orleans for eight dollars, and that it had never been there; that by reason of said libel, the plaintiff was prevented from selling his said statue, and thereby caused to lose \$30,000, and that one Thomas Palmer had, prior to the publication of said libel, agreed to purchase said statue, and to pay therefor in real estate then worth a large sum, to wit, the sum of \$30,000, but that by reason of said libel said Palmer was caused and induced to refuse to carry out his agreement, and wholly abandoned the same.

At the trial in the Superior Court, before Rockwell, J., the publication of the article was admitted by the defendant and also the fact that it referred to the plaintiff's statue. Both the plaintiff and Palmer testified that the latter agreed in writing to purchase one-half of the statue, and offered for the same real estate, worth at the time of the agreement \$17,000, and that on account of the defendants' publication he refused to carry out his agreement.

The plaintiff introduced evidence tending to show that the statement in regard to the sale at New Orleans was false, and offered evidence concerning the value of the statue as a scientific curiosity; but

the judge ruled that the question of its value in that respect, or for purposes of exhibition, was immaterial.

The only evidence put in by the defendants was that one of them testified that he wrote the article as a humorous comment on an article which he saw in the Chicago Tribune, purporting to give a detailed account of the sale of the Cardiff Giant at New Orleans for \$8, and commenting at length thereon; and that he did not know the plaintiff, and wrote without malice.

The plaintiff requested forty-one instructions to the jury, of which it is only necessary to state the following:

"9. That if the defendants published said article heedlessly and carelessly, without due regard to the rights of the owner of the Cardiff Giant, they are liable to the plaintiff for all damages thereby caused him."

The judge declined to give any of the instructions requested in the form in which they were presented, but instructed the jury as follows:

"This is in effect an action for special damages on the case for disparaging the plaintiff's statue. The only ground on which it can be maintained is special damage, which must be set out in the declaration and established by the proof. The only allegation of special damage is in relation to the transaction with Palmer. To sustain this action the plaintiff must prove, and the jury must be satisfied, that the publication was false in some material respect, and that it occasioned special damage to him, the plaintiff, by reason of the contract with Palmer, which would have been otherwise carried through; that the publication was malicious, that is to say, that the disposition and purpose differed from the general purpose of published news, or interesting and instructing their readers by their published articles; a disposition wilfully and purposely to injure the value of this statue with wanton disregard of the interest of the owner. If the plaintiff has shown that he was the owner of the statue alluded to in this publication, that it was valuable to him to sell in whole or in part, and that the publication was made falsely and maliciously by the defendants, and that it caused an injury to the plaintiff by preventing the sale to Palmer, the action may be maintained, although in the publication no imputation is cast on the personal character of the plaintiff. But if the jury are satisfied that the publication was honestly made by the defendants believing it to be true, and that there was reasonable occasion in the conduct of their newspaper in matters where their interests were concerned, an occasion which fairly warranted the publication, that would be a good defence to the action, unless express malice or malice in fact is proved."

The judge gave the jury no instructions as to the difference between malice in fact and malice in law, and gave the jury no definition of malice, other than as above stated; but no request was made for further instructions upon the subject of malice. Instructions in rela-

tion to damages were given to which no objection was made. The jury found for the defendants; and the plaintiff alleged exceptions to the rulings and refusals to rule as requested.

GRAY, C. J. This action is not for a libel upon the plaintiff, but for publishing a false and malicious statement concerning his property, and could not be supported without allegation and proof of special damage. *Malachy v. Soper*, 3 Bing. N. C. 371; S. C. 3 Scott, 723.¹ *Swan v. Tappan*, 5 Cush. 104. The special damage alleged was the loss of the sale of the plaintiff's statue to Palmer. Evidence of the value of the statue as a scientific curiosity or for purposes of exhibition was therefore rightly rejected as immaterial.

The editor of a newspaper has the right, if not the duty of publishing, for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition as upon any other matter of public interest; and such a publication falls within the class of privileged communications² for which no action can be maintained without proof of actual malice. *Dibdin v. Swan*, 1 Esp. 28. *Carr v. Hood*, 1 Campb. 355. *Henwood v. Harrison*, L. R. 7 C. P. 606.

But, in order to constitute such malice, it is not necessary that there should be direct proof of an intention to injure the value of the property; such an intention may be inferred by the jury from false statements, exceeding the limits of fair and reasonable criticism, and recklessly uttered in disregard of the rights of those who might be affected by them. Malice in uttering false statements may consist either in a direct intention to injure another, or in a reckless disregard of his rights and of the consequences that may result to him. *Commonwealth v. Bonner*, 9 Met. 410. *Moore v. Stevenson*, 27 Conn. 14. Erle, C. J. in *Hibbs v. Wilkinsen*, 1 F. & F. 608, 610; and in *Paris v. Levy*, 2 F. & F. 71, 74, and 9 C. B. (N. S.) 342, 350. Cockburn, C. J., in *Morrison v. Belcher*, 3 F. & F. 614, 620; in *Hedley v. Barlow*, 4 F. & F. 224, 231; and in *Strauss v. Francis*, 4 F. & F. 1107, 1114.

The only definition of malice, given by the learned judge who presided at the trial, was therefore erroneous, because it required the plaintiff to prove "a disposition wilfully and purposely to injure the value of this statue," as well as "wanton disregard of the interest of the owner." The jury, upon the evidence before them, and under the instructions given them, may have been of opinion that the defendants' statements that the plaintiff's statue was an "ingenious humbug," "a sell" and "a fraud," were false, reckless and unjustifiable, and had the effect of injuring the plaintiff's property, and caused him special damage; and may have returned their verdict for the defendants solely because they were not convinced that they intended such injury.

¹ *Ante*, p. 221.

² See *post*, p. 456, et seq.; also see Bigelow on Torts, 8th ed. ch. IX, s. 11.

The ninth request for instructions distinctly called the attention of the court to the necessity of a definition of the legal meaning of malice in this respect. As the instructions given were erroneous in this particular, and we cannot know that the error did not affect the verdict, the plaintiff is entitled to a new trial, in order that he may satisfy a jury, if he can, under proper instructions, that he has a good cause of action against the defendants.

Exceptions sustained.

CHAPTER V.

MALICIOUS PROSECUTION.

Statute of Malicious Appeals,¹ 13 Edward I, Chapter 12. 1285.

FORASMUCH as many, through malice intending to grieve others, do procure false appeals to be made of homicides and other felonies by appellors, having nothing wherewith to make satisfaction to the king, for their false appeals nor to the parties appealed for their damages; it is ordained, that when any, being appealed of felony surmised upon him, doth acquit himself in the king's court in due manner, either at the suit of the appellor, or of our lord the king, the justices, before whom such appeal shall be heard and determined, shall punish the appellor by one year's imprisonment, and such appellors shall nevertheless restore to the parties appealed their damages, according to the discretion of the justices, having respect to the imprisonment or arrestment that the party appealed has sustained by reason of such appeals, and to the infamy that he has incurred by the imprisonment or otherwise.

And if peradventure such appellor be not able to recompense the damages, it shall be inquired by whose abetment or malice the appeal was commenced, if the party appealed desire it; and if it be found by the same inquest that any man is abettor through malice, at the suit of the party appealed, he shall be distrained by a judicial writ to come before the justices; and if he be lawfully convicted of such malicious abetment he shall be punished by imprisonment and restitution of damages, as before is said of the appellor. And from henceforth in appeal of the death of a man there shall no essoin lie for the appellor, in whatsoever court the appeal shall have been determined.

RIDER v. KITE.

Court of Errors and Appeals of New Jersey, November, 1897. 61 N. J. L. 8.

ON error to Mercer Circuit.

The record returned with this writ shows a judgment against plaintiff in error in favor of defendant in error in an action for malicious prosecution.

A bill of exceptions shows that, to prove the termination of the

¹ See Bigelow on Torts, 8th edition, p. 211, note 1.

prosecution complained of, evidence was given that Kite was arraigned before a justice of the peace upon a charge of breaking and entering, &c., made by Rider; that a hearing was demanded by Kite and accorded by the justice, and that upon such hearing the justice dismissed the complaint and discharged Kite from custody. It further appears that the above was the only evidence that the prosecution had been terminated before the commencement of the action. Thereupon a nonsuit was asked and refused, and an exception to said refusal was allowed.

MAGIE, C. J. The only question presented in this case is, whether there was sufficient evidence that the prosecution, which was claimed to be malicious, had been terminated before the commencement of the action. If not, it was error to refuse the nonsuit, for nothing is better settled in this state than that such action cannot be maintained unless the prosecution complained of had been terminated before the commencement of the action. *Potter v. Casterline*, 12 Vroom 22; *Apgar v. Woolston*, 14 Id. 57; *Lowe v. Wartman*, 18 Id. 413.

The contention on the part of plaintiff in error is that under our Criminal Procedure Act as amended, the discharge by the magistrate of an accused person, upon examination, does not terminate the prosecution, but that it remains pending until the grand jury has considered, or at least has had an opportunity to consider, the complaint by which the prosecution was commenced.

It is not denied that, prior to the adoption of the amendments to the Criminal Procedure Act, to which our attention is called, such a discharge would have terminated the prosecution so as to give a cause of action to the injured party if the prosecution was malicious. Clearly it would have done so. For such an action may be brought whenever the particular prosecution complained of has been ended, although the accused may still be liable to be called to answer for the same offence. The prerequisite is only that the particular prosecution be disposed of in such manner that it cannot be revived, and the complainant, if he intends to proceed further, must institute proceedings *de novo*. *Apgar v. Woolston*, *ubi supra*; *Clark v. Cleveland*, 6 Hill 344. When, upon a criminal complaint, an accused person is arrested and brought before a magistrate, the latter, upon examination, may require the accused to enter into recognizance to abide the action of the grand jury, and in default of such recognizance, commit him to jail for the same purpose, or he may dismiss the complaint and discharge the accused from custody. When the former course is pursued, it is obvious that the prosecution has not terminated, for the accused is either confined or under recognizance until the complaint whereon he was arrested has been further considered. But when the latter course is taken and the accused discharged, it is equally obvious that the particular prosecution is at an end, for, although the complaining

witness may voluntarily go before the grand jury and charge the accused with the same offence, and an indictment may even be found, yet such prosecution would be a new one commenced by the complainant before the grand jury and not founded on the original complaint. *Apgar v. Woolston*, ubi supra; *Fay v. O'Neill*, 36 N. Y. 11; *Robbins v. Robbins*, 133 N. Y. 597; *Moyle v. Drake*, 141 Mass. 238.

The legislation which, it is contended, has changed this rule is contained in two supplements to the Criminal Procedure Act, — the first approved March 12th, 1878 (Gen. Stat., p. 1144, pl. 124) and the second approved March 24th, 1892 (Gen. St. p. 1152, pl. 162).

By the first of these supplements, every justice of the peace is required to transmit to the prosecutor of the pleas of his county "every complaint, warrant, recognizance and all other papers in every criminal case," and a failure to perform this duty, by delivering such matters to the prosecutors, the day before the first day of each term, is made a misdemeanor.

The second supplement requires every committing magistrate to keep a book in which he shall enter the name of every person against whom he shall issue a warrant, with other particulars respecting the charge and the proceedings thereon, and to transmit the book to the prosecutor within ten days before each term, with all papers in his possession "relating to criminal business."

The contention is that, notwithstanding a complaint has been dismissed, and the accused discharged from custody under the warrant, the fact that the complaint and warrant are transmitted to the prosecutor of the pleas, continues the prosecution originally begun by the complaint. But this contention cannot prevail. If it be assumed that the legislative intent expressed in this supplement was to require the transmission of dismissed complaints (which admits of a doubt), it is impossible to discover an intent to impose upon the prosecutor as a duty, to submit such complaints to the grand jury. Doubtless, if upon examination he should be of opinion that the accused in any case had been improperly discharged, he might lay that case before the grand jury, but the prosecution thus commenced would be a new one, not founded on the original complaint, although begun upon information derived therefrom. This supplement has not changed the rule that fixed the termination of a criminal prosecution, for the purpose of maintaining an action of this kind, at the period of the discharge of the accused from custody under the warrant.

The other supplement has no applicability. Its purpose is expressed to be merely to enable the prosecutor to have a check upon committing magistrates, and to assure himself that all papers relating to criminal matters had been sent to him.

The result is that the nonsuit was rightly refused, and the judgment must be

Affirmed.

GRAVES *v.* DAWSON.

Supreme Court of Massachusetts, January, 1881. 130 Mass. 78.

TORT for malicious prosecution. Writ dated April 20, 1878. The declaration alleged that the defendant, maliciously and without probable cause therefor, caused a complaint to be sworn out before a trial justice of the county of Hampshire, wherein the plaintiff was charged with the crime of larceny of sundry articles alleged to be the property of the defendant, and of the value of \$175; that thereupon the justice issued his warrant for the arrest of the plaintiff, which was duly served, and the plaintiff was brought into court; that the defendant, wrongfully and without probable cause, procured the justice to adjudge that there was probable cause to believe him, the plaintiff, guilty of the offence charged, and to order him to recognize, with surety in \$500, for his appearance at the Superior Court to be held at Northampton on the third Monday of December, 1872; that the plaintiff being unable to furnish sureties for said recognizance, was committed by said justice to jail to await the action of the grand jury, and the said justice duly returned to said Superior Court authenticated copies of said complaint and warrant, and the doings thereon, and the same were entered on the docket of said court; that the plaintiff was detained in jail, by reason of said commitment, until December 26, 1872, when it was ordered by the justice of said Superior Court sitting at Northampton that the plaintiff be discharged; that the entry of the case on the docket of the Superior Court was continued thereon until December 24, 1873, when the district attorney entered a nolle prosequi thereon; that the grand jury for said county found no bill against the plaintiff; and that the prosecution was wholly determined before the commencement of this action.

The defendant demurred to the declaration, assigning the following reasons therefor: "1. Because it is nowhere alleged in said declaration that the matter of complaint and charge made by the defendant against the plaintiff was made or exhibited before the grand jury for the county of Hampshire, or that the said grand jury ever considered of the matter of said complaint, or of said charge against the plaintiff. 2. Because it is nowhere averred in said declaration that the plaintiff had a trial, or was otherwise put in peril before the justice or in the Superior Court. 3. Because neither the plaintiff's discharge by the justice of the Superior Court on December 26, 1872, nor the entry of a nolle prosequi by the district attorney on December 24, 1873, fully, effectually, and finally terminated the prosecution against the plaintiff so as to entitle him to maintain this action." The Superior Court sustained the demurrer, and entered judgment for the defendant; and the plaintiff appealed to this court.

LORD, J. We think it was error in the Superior Court to sustain the demurrer in this case. The principal ground upon which it is contended that the demurrer should be sustained is that it appears by the declaration that the prosecution claimed to have been malicious was terminated by a *nolle prosequi*, and that a *nolle prosequi* is not such a legal termination of a suit as the plaintiff is required to show in order to maintain his action of malicious prosecution. *Parker v. Farley*, 10 Cush. 279, is relied upon in support of this proposition.

That case has been so many times referred to as supporting such doctrine in its broadest form, and thus apparently conflicting with other decisions in other tribunals and within our own jurisdiction, that it is proper to examine the report of that case, and see how far it accords with or differs from established principles. Upon an examination of that case, it appears that nothing was decided by it except that, as matter of law, the termination of a prosecution by the entry of a *nolle prosequi* was not necessarily such a termination of the suit as entitled a defendant to maintain an action for malicious prosecution. That question may be one of pure law, or purely of fact, or it may be a mixed question of law and fact. *Parker v. Farley* was not heard upon demurrer, nor upon exceptions. The parties, foreseeing that certain questions of law which might be decisive of the case would inevitably arise during the trial, as matter of convenience and economy, agreed to present those questions of law for the decision of the court prior to the trial of the facts before a jury, and to accomplish this, and render an investigation of the facts unnecessary, the Chief Justice of this court made a formal ruling, by consent of counsel, that the action could not be maintained, and reported the case for the decision of the full court. In order to present such questions of law, it became necessary to state all the facts in relation to the prosecution of the plaintiff, that the court might see whether there were facts necessarily conclusive in law against the right of the plaintiff to recover.

The facts thus presented were substantially these: Farley, one of the defendants, made complaint against Parker, the plaintiff, of having committed the crime of perjury. Upon this complaint an indictment was found against Parker, and upon that indictment Parker was tried and convicted of perjury before the Court of Common Pleas. During such trial, exceptions were taken by him. Those exceptions were argued before this court and overruled, so that nothing remained in that suit, so far as the record showed, except an entry of judgment. Parker thereupon by written motion and affidavit asked for a new trial of the case because of newly discovered evidence, and this motion was allowed and a new trial was granted. Subsequently Parker applied to this court to compel the district attorney to enter a *nolle prosequi* in the suit, because of an agreement to that effect, and some time afterward the district attorney did enter a *nolle prosequi*, and

no further proceedings were had in the case, and the prosecution was thereby terminated.

The mere presentation of these facts shows that the naked question whether, as matter of law, the entry of a *nolle prosequi* is or is not such a termination of a suit as authorizes the prosecuted party to maintain an action for malicious prosecution, was not raised. It is undoubtedly true that the Chief Justice was inclined to the opinion that such was the tendency of the common-law decisions; yet it is obvious that it was not necessary for him to consider that question, and it is entirely clear that he did not consider it; for he says expressly, that, if, under some circumstances, the rule be that a *nolle prosequi* is to be taken to be the final termination of the suit, "we should be of opinion that it would not apply, when a *nolle prosequi* and discontinuance is entered by consent, or by way of compromise, or where such exemption from further prosecution has been demanded as a right, or sought for as a favor, by the party prosecuted. In the present case, it appears by the record, that the plaintiff endeavored to obtain such exemption from trial by requiring the district attorney to enter a *nolle prosequi*."

But the other point decided in *Parker v. Farley* was absolutely decisive of the case. A jury properly empanelled, under correct instructions in law, had found the plaintiff guilty of the crime of perjury. Upon his application the court had granted him a new trial. He never had a new trial, he did not desire a new trial, he asked to have a *nolle prosequi* entered, he applied to this court to compel the district attorney to enter it, and it was subsequently entered; and upon that state of facts the court held that the record showed conclusively probable cause for the prosecution, and consequently that no action could be maintained by the plaintiff.¹ We think, therefore, as matter of law, it cannot be said that the entry of a *nolle prosequi* is conclusive upon the rights of a party.

The authorities upon this subject are carefully collated and arranged by the present Chief Justice of this court in *Cardinal v. Smith*, 109 Mass. 158, and the result of all those authorities is, that whether a prosecution has been so terminated as to authorize the party prosecuted to commence an action for malicious prosecution is to be determined by the facts of the particular case of which facts the entry of a *nolle prosequi* may be one of several, may be the only fact, may be a controlling fact, or may be an entirely unimportant one.

We have discussed this question thus far as if the proceedings in this case had been terminated by a *nolle prosequi*. But that entry may have been a wholly unimportant and immaterial one, or indeed an incompetent fact. The plaintiff avers that he was held for appearance before the Superior Court at the term holden on the third Monday of December, 1872, and that authenticated copies of the complaint

¹ See *Adams v. Bicknell*, post, p. 252.

and warrant and proceedings thereon were entered upon the docket of that court; and, though he does not state the facts chronologically in his declaration, yet he does state the fact that at such term of the court the grand jury found no bill against him, and that on the 26th day of December he was discharged from custody under such complaint by order of the Superior Court; and it has been repeatedly held that the discharge of a party because the grand jury found no bill against him is a legal end to the prosecution. See cases cited in *Cardinal v. Smith*, *ubi supra*. The plaintiff avers in his declaration that this complaint was entered upon the docket of the Superior Court at December term, 1872, and avers further that the district attorney at the corresponding term of the court a year afterward entered a *nolle prosequi*. This fact may or may not be important. If, in point of fact, it shall appear that the grand jury found no bill, and by reason thereof the court ordered the discharge of the party at the same term of the court, it is difficult to understand what legitimate results would follow from the subsequent entry of a *nolle prosequi*, or how the rights of a party discharged a year before that entry could be affected.

It is sufficient if the plaintiff in his declaration states facts upon which, if proved, he would be entitled to a verdict. We think he has stated such facts in his declaration. Whether when he offers his proofs it shall be found that they are insufficient in law or in fact to support his allegations, is a matter into which we cannot inquire upon this demurrer.

*Demurrer overruled.*¹

GRAVES v. SCOTT.

Supreme Court of Appeals of Virginia, September, 1905. 104 Va. 372.

THE case is stated in the opinion.

KEITH, President.

This is an action for malicious prosecution, in the Circuit Court of Giles county, in which the defendants demurred to the declaration. The only question raised is whether or not it is sufficiently averred that the prosecution had been terminated, which was alleged to have been maliciously instituted.

It seems that the defendants had charged Graves with having procured goods and chattels of them under false pretences, and under a warrant issued by a justice he was arrested and entered into a recognizance for his appearance before the justice upon a day named. When the day arrived, the declaration proceeds to set forth, that "the

¹ See S. C. 133 MASS. 419.

said plaintiff in obedience to said recognizance, appeared before the said justice at the said place designated for trial, and had with him his witnesses to prove and establish his innocence of the said supposed offence charged in the said warrant and complaint, and announced his readiness for a trial to the said justice and to the said Scotts, and insisted upon a trial then and there, but the said defendants refused and declined to be sworn and give any evidence touching the supposed crime charged in said warrant against said plaintiff, and failed to offer and produce, and refused to offer and produce, when called upon, any evidence whatsoever to prove the charge in said warrant against the said plaintiff, and then and there the said justice aforesaid dismissed the said warrant at the costs of the said Scotts, and then and there caused the said plaintiff to be discharged out of custody, fully acquitted of the said supposed offence, and the said defendants have not further prosecuted the said complaint, but have deserted and abandoned the same, and the said complaint and prosecution is now fully ended."

The demurrer was sustained, and a writ of error brings the case before us for review.

In *Ward v. Reasor*, 98 Va. 399, this court held, that "in an action for malicious prosecution it must be charged and proved, among other things, that the prosecution alleged in the declaration was conducted to its termination, and that it ended in the final acquittal of the plaintiff. An allegation that an offence of which a justice of the peace had jurisdiction was dismissed by him 'without the introduction of any testimony' or that the defendant 'without the introduction of any testimony' caused the plaintiff to be discharged, and not prosecuted for said offence, is not such an averment of the final termination of the prosecution as will support an action for malicious prosecution. It amounted to no more than a *nolle prosequi*, which was no bar to a further prosecution for the same offence. It did not establish the innocence of the plaintiff, or show want of probable cause on the part of the defendant."

It is obvious, therefore, that the case under consideration must be affirmed if we adhere to the law as propounded in *Ward v. Reasor*. The conclusion there reached is supported by Hilliard on Torts, by Greenleaf, by Mr. Minor in his Institutes, by Barton in his Law Practice, by the Supreme Court of Massachusetts in *Bacon v. Towne*,¹ 4 Cush. 217, and by a dictum by Judge Burks in *Scott & Boyd v. Shelor*, 23 Gratt. 891.

The opportunity for a more extensive research, and a further consideration of the principles involved, have led us to a different conclusion.

It is true that public policy favors prosecution for a crime, and requires that a person who in good faith and upon reasonable grounds

¹ But see *Graves v. Dawson*, ante, p. 233.

institutes proceedings upon a criminal charge shall be protected. 19 Am. & Eng. Encyc. of Law, p. 650.

It is the lawful right of every man to institute or set on foot criminal proceedings wherever he believes a public offence has been committed. But it is a duty which every man owes to every other not to institute proceedings maliciously which he has no good reason to believe are justified by the facts and the law. Newell on Malicious Prosecution, sec. 1.

The difficulty, therefore, presented is to protect the citizen against criminal proceedings which are not justified by the facts and by the law, being at the same time careful not unduly to deter men from the institution of criminal proceedings honestly intended to punish public offences against the law.

To meet and harmonize these difficulties as far as practicable, the law requires that the plaintiff in an action for malicious prosecution must avail¹ and prove the institution of the suit or proceeding without reasonable cause; malice in the institution of the suit or proceeding; and the complete termination of the suit or proceeding. If a plaintiff in a suit for malicious prosecution can maintain these propositions to the satisfaction of a jury, he may and should recover damages; nor would the result tend to deter others from the honest and fearless prosecution of offenders against the law.

In *Scott & Boyd v. Shelor*, supra, Judge Burks states, that to warrant a recovery in a suit for malicious prosecution it must be proved that the prosecution alleged in the declaration had been set on foot and conducted to its termination. Had he stopped there, he would have been in entire harmony with the law as stated in Newell on Malicious Prosecution; but he goes further and says, "and that it ended in the final acquittal and discharge of the plaintiff." It is true that in the case which Judge Burks was considering there had been a final acquittal and discharge of the plaintiff, and it, of course, cannot be questioned that there was a final termination of the prosecution; but that case cannot be binding authority for the proposition that nothing short of a final acquittal constitutes such determination of the proceedings as will support an action for malicious prosecution.

In *Morgan v. Hughes*, Durnf. & East's Rep., vol. 2, p. 225, Justice Buller says: "Saying that the plaintiff was discharged is not sufficient; it is not equal to the word 'acquitted,' which has a definite meaning. Where the word 'acquitted' is used, it must be understood in the legal sense, namely, by a jury on the trial. But there are various ways by which a man may be discharged from his imprisonment, without putting an end to the suit. If, indeed, it had been alleged that he was discharged by the grand jury's not finding the bill, that would have shown a legal end to the prosecution."

Of course, if in *Morgan v. Hughes*, it had been averred that the plaintiff was acquitted, it would have been sufficient, as in *Scott &*

¹ Sic.

Boyd v. Shelor, supra; but it was held that "discharged" was not sufficient averment in a declaration that the prosecution had terminated. If it had been alleged that he was discharged by the grand jury not finding a bill, that would have been a legal end to the prosecution and would, therefore, have been sufficient averment of the legal termination of the particular proceeding against the plaintiff to have warranted the institution by him of his suit for malicious prosecution.

In the note to *Ross v. Hixon* (Kan.), 26 Am. St. Rep. 123, by Freeman, it is said, that "The prosecution on which the action is based must have terminated without resulting in the conviction of the plaintiff. It is sometimes said that it must have terminated in his acquittal, but this is not true. A trial on the merits or otherwise is not essential. It is sufficient that the prosecution has ended so that it cannot be reinstated nor further maintained without commencing a new proceeding, but it must have terminated in some of the several modes in which it is possible for a criminal proceeding to reach a stage beyond which the accused cannot be further prosecuted therein." Citing *Casebeer v. Drahoble*, 13 Neb. 465; *McWilliams v. Hoban*, 42 Md. 56; *Blalock v. Randall*, 76 Ill. 224; *Gillespie v. Hudson*, 11 Kan. 163; *Schippel v. Norton*, 38 Kan. 567. Further discussing the question, he speaks of a discharge by a committing magistrate, and says that "if the examining magistrate finds that there is not sufficient cause to hold the accused to answer, and therefore discharges him, that prosecution is thereby ended; and the consideration that other prosecutions may be brought against the same person on the same charge, and that the grand jury, on its presentation to them, may find an indictment thereon, cannot prevent the action of the magistrate from having its effect as a termination of the prosecution before him, sufficient to support the civil action." And so with the failure of a grand jury to find an indictment.

With respect to the entry of a *nolle prosequi*, he says that "if some action or proceeding on the part of the court, or otherwise, is required to make an entry of *nolle prosequi* operative as a final termination of a prosecution, then of course such action or proceeding must supplement such entry; but when it is manifest that the prosecution is at an end, and cannot be revived, it is not material how it came to its end, and the right of the party injured by it to seek redress is complete."

And, speaking generally as to other means of terminating a prosecution, this learned author says: "The only reasonable ground for denying that the termination of a prosecution by the entry of a *nolle prosequi* will support an action for malicious prosecution was, that there had been no trial on the merits, and therefore no acquittal of the accused; but it is settled, as we think, beyond dissent that a trial on the merits is not essential. To hold it essential would be to permit a prosecutor to do all the damage which a malicious prosecution can

possibly effect, and then deny the accused the opportunity to vindicate himself by a trial, by having the proceeding quashed or dismissed, and thus escaping all liability for the wrong unlawfully inflicted. Therefore, any mode by which a prosecution may be dismissed or ended, though without a trial, is sufficient. The indictment may be insufficient, and for that reason may be quashed before trial, or upon trial may require the jury to return a verdict of acquittal. In either event, if the accused is discharged by the court, the prosecution is finally terminated in the sense that an action for malicious prosecution may be instituted and sustained, though there is nothing to prevent the finding of another indictment sufficient in form."

This statement of the law by Mr. Freeman is sustained by a great array of authority, which we deem it needless to discuss or cite.

At sections 248 and 249 of Bishop on Non-Contract Law, it is said, that "if on motion of the State's attorney, a criminal cause is stricken from the docket, with leave to reinstate it, the defendant is not discharged from the indictment, and a suit for malicious prosecution will be premature. But a *nolle prosequi* ends the indictment past recall, and thereupon the right to a malicious prosecution suit is perfected—a proposition from which a few of our courts, misapprehending the effect of a *nolle prosequi*, have dissented, making distinctions not necessary to be particularly pointed out here.

"The methods of ending the proceeding are numerous, and they need not be all specified. It is sufficient, for example, if the indictment is quashed and the prisoner discharged by judgment of the court. Only the particular proceeding need be at an end, it being immaterial that the party is subject to a new one. A criminal prosecution, said a learned judge, is 'terminated, (1) where there is a verdict of not guilty; (2) where the grand jury ignore a bill; (3) where a *nolle prosequi* is entered; and (4) where the accused has been discharged from bail or imprisonment.' Therefore the court held that a prosecution was not ended while pending before the grand jury. A discharge by the examining magistrate will suffice. In the nature of some proceedings the defendant has nothing to do, and whenever the plaintiff's steps are finished, the right to the malicious prosecution suit is complete; 'as,' it was judicially observed, 'where the plaintiff was committed on articles of peace for a definite term unless he should find sureties for the peace. In such a case the plaintiff is allowed, *ex necessitate rei*, to maintain his action, though he was discharged by the effluxion of the time for which he was committed, for the reason that he is not at liberty to controvert the statement of the defendants in making the complaint, and therefore could not have a hearing and obtain a favorable decision.' A release on giving surety to keep the peace is a sufficient ending of the proceeding."

To the same effect is Cooley on Torts (2 Ed.), at p. 215.

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It would be easy, but we think unnecessary, to cite very many adjudicated cases in support of the views of the eminent textwriters from whom we have quoted. We shall content ourselves with adding to the authorities adduced the statement of the law as given in 19 Am. & Eng. Encyc. of Law, p. 681, "that a prosecution may be regarded as terminated when it has been disposed of in such a manner that it cannot be revived, so that the prosecutor, if he intends to proceed further, must institute proceedings *de novo*."

The judgment of the Circuit Court is reversed.

Reversed.

DRIGGS *v.* BURTON.

Supreme Court of Vermont, November, 1871. 44 Vt. 124.

THIS was an action on the case for malicious prosecution. The general issue was pleaded and the case was tried before a jury. There was evidence for the plaintiff that on July 22, 1868, the plaintiff was arrested, upon complaint made by the defendant, and taken before one Hollenbeck, a justice of the peace, on a charge that the plaintiff had committed perjury by giving false testimony in an arbitration suit between the defendant and one Clark; that the case was continued to July 23, and again to July 25, at the request of the State's attorney, to enable him to procure testimony; that on the 25th, the witnesses not appearing, the State's attorney entered a *nolle prosequi*, and no hearing was had upon the case (this appeared by the justice's record). It seems that the plaintiff's counsel suggested to the State's attorney that it was hard to hold the plaintiff so long, but did not otherwise indicate assent to the entry of the *nolle prosequi*. There was also evidence of the activity of the defendant in search for evidence to be used against the plaintiff in the criminal action. The plaintiff admitted that he had testified falsely in the suit between Clark and Burton, but claimed that he did so innocently and in mistake. Evidence was admitted, over the defendant's objection, that subsequent to the trial of the arbitration action, Clark told Driggs of the error in his testimony and that Driggs was not at first fully satisfied, but finally conceded that he was wrong.

The evidence for the plaintiff, further, was that Driggs' erroneous testimony before the arbitrators was not insisted upon, and that there was laughing among the counsel (in that case) about it.

The evidence of the defendant was that he believed that Driggs purposely swore falsely; that Clark and Driggs both had suits pending against him and that he had been told by a certain person that one Sowles had knowledge of complicity between Clark and Driggs in reference to the lawsuits, and that after procuring the complaint

against the plaintiff, he applied to Sowles to get him to testify, but that Sowles evaded and declined to testify; that he, Burton, had no malice against Driggs.

The defendant asked the court to instruct the jury, *inter alia*, that the prosecution, before Justice Hollenbeck, having terminated in a *nolle prosequi*, in the manner stated, there was not such a determination of the case as to warrant a recovery in this suit; that upon the undisputed facts there was probable cause for the prosecution, *viz.*: that Driggs did swear falsely upon a material point, and that known to Burton to be false, and without any intimation to Burton, from any source, that Driggs claimed to have given his testimony under a mistake; that this is a question of law for the court to determine.

The court declined to charge as requested, (except so far as is contained in the charge, as hereinafter stated), but did charge the jury, in substance, as follows:

That the disposition of the prosecution against Mr. Driggs, by the entry of a *nolle prosequi*, was such a termination, under the circumstances of the case, as would allow of the plaintiff's recovery in this action, provided his case was made out, in other respects, according to the instructions of the court.

That it being conceded that a prosecution was instituted against the plaintiff for perjury, on which he was arrested, and subsequently discharged by *nol. pros.*, and that it was set on foot by the defendant, the questions to be considered and determined by the jury were whether the defendant, in so doing, acted without probable cause and maliciously, and that it was for the plaintiff to establish — the burden of proof being on him — to the satisfaction of the jury, that the defendant did act without probable cause and with malice. If he failed to make out either of these points he would not be entitled to recover.

That probable cause meant such a state of facts and circumstances as would induce men of ordinary prudence and conscience to believe the charge to be true; whether such probable cause, as thus defined, existed in the present case, was for the jury to determine, upon a careful review of all the evidence in the case. If the plaintiff failed to satisfy the jury that the defendant acted without such probable cause, that he had no such reason to believe, and did not believe, the plaintiff to be guilty, then the case is at an end, no matter what the defendant's motives might have been. Even if, from malicious or bad motives, he instituted a prosecution for which he had probable cause, the plaintiff would not be entitled to recover, nor would that prove a want of probable cause. If the jury are satisfied that no such probable cause existed, they will then consider the question whether the defendant is shown to have acted maliciously.

That if the prosecution was instituted without probable cause, malice may then be inferred, *prima facie*. The inference would be, if nothing further appeared, that the defendant's conduct was malicious and

in bad faith, and it would then be incumbent on him to show that he acted in good faith and without malice. But it does not necessarily follow that, because the prosecution was started without probable cause, it was done maliciously. It may still have been in good faith and without malice. Both must have concurred; and the question of malice is for the jury to determine upon the evidence, under the foregoing instructions: whether the defendant had probable cause to believe in the charge, and whether he acted maliciously, are questions for the jury.

That if the defendant, knowing the testimony was false, believed it was knowingly so, that would be probable cause.

The jury returned a verdict for the plaintiff and the defendant took exceptions to the court's rulings and refusals to rule as requested.

WHEELER, J. From the oral evidence received without objection and not contradicted, it appears that the plaintiff was in fact discharged from custody, and that the proceedings against him before Justice Hollenbeck came in fact to an end. There was no formal discharge of him by the justice, but the proceedings that were had in effect discharged him. The entry made by the justice upon his files was merely *nolle prosequi* by the State's attorney; but that entry was a mere memorandum, made by the justice, by which to write out the formal record of the proceedings at large. The full record would show the discharge of the plaintiff and the end of the proceedings. Neither the form of the memorandum nor the want of a full record ought to, or can, vary the effect of what was done. There are cases that hold that the entry of a *nolle prosequi* by a prosecuting attorney is not a sufficient termination of an indictment to warrant a recovery for a malicious prosecution of the indictment, and that nothing short of an acquittal upon the merits would be sufficient for that purpose. Where the entry is the mere act of the prosecuting attorney and no action of the court is had upon it, the entry would not be an end of the proceedings, and for that reason would not warrant any action which could not be had before the proceedings were at an end. Upon proceedings against the plaintiff, Justice Hollenbeck could neither acquit nor convict; but could only bind over or discharge. He did, in effect, discharge the plaintiff; and that was a complete termination of that prosecution, and as favorable a one as could be had for the plaintiff. Under these circumstances, to hold that the prosecution was at an end far enough to warrant an action for maliciously prosecuting it, will not really conflict with the cases alluded to. 1 Am. Lead. Cas. 222. Upon principle, it seems that the termination upon the *nolle prosequi* of the State's attorney, under these circumstances, was sufficient, and no error is found in this respect.

It is urged in behalf of the defendant that the prosecution came to an end so by the consent of the plaintiff as to defeat this action. But, although the plaintiff and his counsel suggested to the State's attorney

that it was rather hard to hold the plaintiff in charge any longer, and the State's attorney thereupon told them he should enter a nolle prosequi the next morning, — and did so — still it does not appear that the suggestion has any influence with either the defendant or the State's attorney with reference to the extent to which the prosecution should be pushed, nor that the defendant did not proceed with the prosecution regardless of any wishes of the plaintiff so far as the defendant otherwise saw fit. The prosecution does not appear to have been ended because the plaintiff consented to a termination of it, but because the defendant did not procure the necessary witnesses, and the State's attorney chose to stop it. No such consent appears here as would be necessary to affect the plaintiff's right of recovery.

The testimony as to what the plaintiff said when informed by Clark of the production of the letter that showed his testimony before the arbitrators was untrue, was quite important in the case if the defendant knew of that transaction. The right of the plaintiff to recover depended largely upon what the defendant did know in respect to all matters connected with the testimony of the plaintiff, and upon what the defendant believed from what he knew. This evidence was admissible and proper to be considered for the purpose for which the court permitted it to be considered, if there was any evidence tending to show that the defendant knew of the facts disclosed by it and the jury found such knowledge from the evidence; and if there was no such evidence it was inadmissible; and if there was such evidence and it was insufficient to prove the knowledge of the defendant, it was not proper to be considered. That there was no direct evidence of such knowledge is conceded here and was held by the court below. *Nash v. Doyle*, 40 Vt., 96, has been referred to as an authority to show that there was some circumstantial evidence of such knowledge to be submitted to the jury. That was a prosecution for bastardy. The prosecutrix had been induced to make oath to an affidavit that a person other than the defendant was father of the child, by unfair means. An important question was whether there was any evidence tending to show that the defendant knew what means were used or not. The affidavit was procured by the defendant's brother, who was his bail, and the defendant's attorney; and the defendant made use of the fact that she had made such an affidavit on the trial. It was held that all these circumstances together were sufficient to warrant a finding of knowledge of the transaction on the part of the defendant.

Here there is no evidence that this defendant's attorneys, or any of them, knew of the transaction between the plaintiff and Clark, nor that any relative or friend or agent of the defendant's knew of it. The defendant may have heard of it, but if he did, no one testified to any fact that would show that he had more than a mere conjecture. Such a conjecture is insufficient from which to find a fact to found

a right of recovery upon. The admission of this evidence, for the purpose and use made of it, seems to be error.

In the charge to the jury, the court defined probable cause accurately and satisfactorily. No just criticism has been, or could be, made of the definition. After giving this definition, the court further charged that, whether such probable cause as thus defined existed in the present case, was for the jury to determine, upon a careful review of all the evidence in the case. This statement of the duty and responsibility of the jury in this respect was not afterwards varied in the charge, but was re-stated several times, with many just considerations as to the application of it, if it was correct. Afterwards, in the order of the charge as stated in the bill of exceptions, the jury were instructed that if the defendant, knowing the testimony was false, believed it was knowingly so, that would be probable cause. This proposition, by itself, is a statement of what in law would amount to probable cause. If the whole charge had been made to conform to this proposition, and the right of the plaintiff to recover had been made to depend upon whether the facts contained in the proposition existed or not, there would have been no error in law as the law is claimed to be by the defendant's counsel. But this part of the charge is to be construed with what preceded it upon the same subject, and in connection with that, the jury must have understood that they were to determine the defendant's belief with reference to the definition of probable cause before stated to them, and that they were to decide, not only upon the existence of the facts, but whether upon the facts they should find to have existed, there was probable cause as defined by the court or not.

What constitutes probable cause in these actions is a question of law for the court. All inferences to be drawn from facts, undisputed or found by the jury to exist, are upon this subject inferences of law and not of fact, and are to be drawn by the court and not by the jury. This rule is peculiar to this class of actions, and has been long established, and is well founded upon sound reasons and good authority. Where the inference to be drawn from existing facts is one of fact, as it usually is in questions of the sufficiency of highways, ordinary care, and the like, it is always to be drawn by the jury. The cases cited upon this point on the part of the plaintiff are apt illustrations of this rule, but they have no application except to cases of that kind. The rule upon this subject as to the existence of probable cause was adopted as early as actions founded upon the want of probable cause were brought into use, and has never been relaxed. In the early history of these actions it was customary to set forth the facts in the defendant's plea, and upon demurrer the court would determine whether there was probable cause or not, upon the facts set forth. *Tindal, Ch. J., Panton v. Williams*, 2 Ad. & El., N. S. 192. Where some or all the facts were in dispute the existence of the facts, and

that only, was submitted to the jury. The early authorities seem to be uniform to this effect. There are some cases — and among them are *Taylor v. Williams*, 2 B. & Ad. 845, and *Broad v. Ham*, 5 Bing., 722 — which alone might seem to countenance the doctrine that the whole evidence and all inferences to be drawn from it were to be submitted to the jury. As to these cases, Ch. J. Tindal, in *Panton v. Williams*, 2 Ad. & El., N. S., 169, in reviewing one of the decisions of Ch. J. Denman, said: "There have been some cases in the later books which appear at first sight to have somewhat relaxed the application of that rule by seeming to leave more than the mere question of the facts proved to the jury; but upon further examination it will be found that although there has been an apparent, there has been no real departure from this rule." And he proceeded to apply the rule to the decision he was reviewing, and reversed it. In *Turner v. Ambler*, 10 Ad. & El., N. S., 252, Lord Denman, Ch. J., said, in granting the rule: "A rule nisi must be granted; but it is not to be presumed that we mean to question the doctrine of *Panton v. Williams*." The rule was afterwards stated and enforced in England, in *Heslop v. Chapman*, 22 El. & E., 296. It has also been strictly adhered to in New York. *Pangborn v. Bull*, 1 Wend., 345; *Baldwin v. Weed*, 17 Wend., 224; *Bulkley v. Ketelas*, 2 Seld., 384. And also in Massachusetts. *Kidder v. Parkhurst*, 3 Allen, 393.

In practice a true application of the rule seems to require that if none of the facts are in dispute, the question of probable cause arising upon them should be decided by the court as a question of law, without the intervention of the jury at all. That if some of the facts are undisputed, and others are in controversy, and the question of probable cause cannot be determined upon the undisputed facts without determining the existence of those in dispute, then the case should be presented to the jury by stating which of the disputed facts are to be passed upon and how, so that by determining the mere existence or non-existence of them, the question of probable cause or the want of it will be determined, according to the view of them in law taken by the court.

This charge, in the view taken of it, did not conform to or apply this rule, and appears to be erroneous. Upon the rule adopted by the court below, the charge was very careful, and manifestly fair and impartial, but these qualities cannot cure error, although they would make it much more wholesome.

Exception was taken to the charge upon the effect of want of probable cause upon the question of malice. Want of probable cause and malice are each essential to the cause of action, and each must be proved, and proof of neither will, as a matter of law, supply proof of the other. The same facts that would make out the want of probable cause in many, and probably in most, cases would tend to show malice. In cases where the facts would have that tendency, the evidence should

be submitted upon the question of malice independently, and that question should not be left to depend upon or follow the finding upon the other. Some of the members of this court think this charge upon this subject was in accordance with these views; other members think it was not. Since the judgment must be reversed upon other grounds, further suggestions upon this point are needless.

Counsel for the defendant insist that this court, having all the evidence before it, can review it and determine the question of the want of probable cause here. The evidence now before the court shows that the plaintiff swore falsely, and that the defendant knew it. These facts are undisputed. If false swearing was perjury, there would be probable cause, beyond question, for the defendant would know that the plaintiff was guilty. But a great deal of testimony is given that is false, and yet is not perjury, and the circumstances are such that those knowing them know that it is not. And, upon the same circumstances, some persons, owing to their own peculiar relations to them, or to their own peculiarities of thought and judgment, would believe the testimony to be wilfully false, while others, differently situated, or with different views, would think it mistakenly so. Here the defendant, from his stand-point and with his views, may have believed that the testimony was wilfully false. If he did, then upon the case as it is now presented, that belief, in connection with the facts that the testimony was false, and he knew it to be so, would amount to probable cause. But if he did not so believe in fact, and the plaintiff was not in fact guilty, then there would be a want of probable cause. This fact of the actual belief of the defendant is an important one, and upon the evidence, cannot be determined as a matter of law, either one way or the other. Therefore, there must be a trial by jury to determine the existence of this fact, as the case now stands, and perhaps others in connection with it, or not, according to the case as it may, upon another trial, be presented. As the case stands, it must be remanded for a new trial.

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Judgment reversed, and cause remanded.

PRICE v. SEIBERT.

Supreme Court of Pennsylvania, May, 1843. 5 W. & S. 438.

THIS was an action against the defendant for a malicious prosecution of the plaintiff for perjury. The court thus instructed the jury:

“The jury is referred to the testimony of Ulrich and Stine, who were present when the plaintiff was examined as a witness before the jury in the matter of lunacy. And if the jury are satisfied from the evi-

dence, that upon that occasion George Price, the plaintiff, did swear that William Seibert was called and examined as a witness for his brother Jacob in the suit between him and Peter Shoch, and persisted in this being the fact according to the testimony of Ulrich, and if you are satisfied that it was false and not the fact, the court instruct you that Jacob Seibert had probable grounds for instituting the criminal proceedings for perjury against George Price, and Jacob Seibert is not answerable in damages in the action for a malicious prosecution, although he did not succeed in convicting George Price of the charge. On the other hand, if the jury are satisfied that George Price testified before the inquest, that William Seibert was a witness in the suit between Peter Shoch and Jacob Seibert, but that he could not say which party called on him, or for which party he was a witness, according to the evidence of Samuel Lutz, a witness called by the plaintiff on this trial, and who was also present and heard George Price give evidence before the jury of inquiry; or if the jury are satisfied that George Price at first testified that William was a witness for his brother Jacob, and on being interrogated, he explained by saying he did not know for which party he was a witness, and only knew he was a witness in that case; then the court instruct you, that Jacob Seibert had no probable cause for prosecuting Price for perjury, and is answerable to him in this action for a malicious prosecution, and malice may be inferred. In actions for malicious prosecutions, it is not sufficient that it is established to the satisfaction of the jury that the criminal prosecution was carried on with malice, but it must also appear that there was a want of probable cause; if both these facts are not made out in this case, the plaintiff is not entitled to recover."

The plaintiff proposed to send out with the jury the affidavit (or information) made by Jacob Seibert before the magistrate when he instituted the proceedings against the plaintiff for perjury; to which the defendant objected, but the court overruled the objection and sealed an exception.

GIBSON, C. J. The Judge put the question of probable cause upon the fact of what the plaintiff had actually sworn before the inquest, and not on the fact of what he was supposed to have sworn. It was a matter of much doubt at the trial of the present cause, whether he had said that the alleged lunatic had been called a witness in *Shoch v. Seibert*, by the defendant, or not; insomuch, that the witnesses who swore positively about it were divided, even insomuch, that a majority were in favor of the affirmative. In this conflict of perception, then, suppose that the prosecutor had acted on a mistaken belief that the plaintiff had sworn what would undoubtedly have been a perjury, would he not have acted on what appeared to have been justifiable cause; and if he did so act, would it not repel the implication of malice? Again, if the same misapprehension was entertained by the

bystanders, would it not materially increase, in an indifferent mind, the probability of the witness's guilt? What is justifiable probable cause, in the technical sense? It is a deceptive appearance of guilt arising from facts and circumstances misapprehended or misunderstood so far as to produce belief;¹ and when the subject of belief is the crime of perjury, the misapprehension may have regard to the extent of the swearing, as well as the truth of it. The question of probable cause, may as well depend on the one as on the other, the difference being, that a misapprehension or doubt is more likely to occur in regard to the former than the latter. Still, the tenor of the testimony, resting as it does in the understanding and memory of the hearers, who may have misapprehended or forgotten it, may not be accurately perceived by the prosecutor; for the uncertainty of human perception is well known to those who are familiar with the examination of facts depending on oral proof. No two eye-witnesses ever yet exactly agreed in their account of a transaction; and nothing is more frequent than the misapprehension of a person's words. A by-stander relying on his own ears, may be grossly mistaken; and when the matter has regard to the sum of a witness's testimony instead of the truth of it, there may be such a mistake as to produce an appearance of perjury sufficient to justify a prosecution of it. If, then, there was a reasonable belief in the minds of the prosecutor and the by-standers that the plaintiff swore to what it is admitted would have been an untruth, whether the belief was well founded or not, there was probable cause amounting to justification.

The exception to the sending out of the prosecutor's affidavit before the magistrate, is not sustained. That document was not a deposition, but an indispensable part of the case put in evidence by the plaintiff himself; and, as such, it does not fall within the rule which excludes a deposition from the jury-room.

Judgment reversed, and a venire de novo awarded.

NOBLETT v. BARTSCH.

Supreme Court of Washington, January, 1903. 31 Wash. 24.

THE case is stated in the opinion.

FULLERTON, C. J. This is an action for malicious prosecution. The respondent was arrested on a warrant issued by a magistrate charging him with the crime of bringing stolen property into this state from a foreign country, and confined in jail for about one week's time. At the time fixed for the preliminary hearing he was discharged at the request of the prosecution without examination or any evidence

¹ That is, reasonable belief. See *Driggs v. Burton*, ante p. 241; *Bigelow on Torts*, 8th ed., p. 212.

being brought against him. The property which he was charged with having brought into the state was alleged to be the property of a partnership composed of the appellants, and to have been stolen by one G. E. Daniel, at Dawson, in the Northwest Territory, where Daniel had been connected in business in some form with the partnership. The respondent alleged in his complaint that the prosecution was instituted maliciously and without probable cause, and that he was damaged thereby in the sum of \$50,000. The jury returned a verdict in his favor for \$1,000, and it is from the judgment entered thereon that this appeal is prosecuted.

The court gave to the jury the following instructions: "(2) In an action for malicious prosecution, the fact that the plaintiff was discharged by the examining magistrate without a hearing on the merits throws the burden of proving probable cause on the defendants." "(4) The dismissal of the prosecution alleged in the complaint without a trial is competent not only for the purpose of showing an end of the prosecution, but in addition it establishes a prima facie case of want of probable cause, and throws upon the defendants the burden of proving¹ that there was a want of probable cause for the prosecution of the plaintiff." "(8) You are instructed further that the presumption exists that there was probable cause, and that the defendants acted without malice and in good faith in instituting the criminal prosecution, and that presumption stands until the plaintiff shows by a preponderance of the testimony that there was a total absence of probable cause, and that the prosecution was malicious; and if the plaintiff has failed to prove to your satisfaction, by a preponderance of testimony, the total lack of probable cause, and malicious institution of prosecution, then your verdict must be for the defendants. In connection with this instruction, however, I charge you that proof that the plaintiff was discharged at the preliminary hearing without a trial on the merits constitutes prima facie proof of the want of probable cause, and throws the burden of disproving it upon the defendants."

From these instructions it will be observed that the trial court took the view that the showing on the part of the respondent that the prosecution against him was voluntarily dismissed cast the burden of showing probable cause therefor upon the appellants. Assuming that a voluntary dismissal is equivalent to a discharge by the committing magistrate, there are cases which maintain this view. *Hidy v. Murray*, 101 Iowa 65; *Barhight v. Tammany*, 158 Pa. 545; *Bigelow v. Sickles*, 80 Wis. 98; *Bornholdt v. Souillard*, 36 La. Ann. 103. On the other hand, there are cases which hold that a discharge by a committing magistrate is not even evidence of want of probable cause. *Stone v. Crocker*, 24 Pick. 84;² *Lancaster v. Langston* (Ky.) 36 S. W. 521; *Israel v. Brooks*, 23 Ill. 575; *Thompson v. Beacon Valley*

¹ Sic, apparently a slip for disproving.

² Cf. *Perkins v. Spaulding*, 182 Mass. 218.

Rubber Co., 56 Conn. 493; *Heldt v. Webster*, 60 Tex. 207; *Apgar v. Woolston*, 43 N. J. Law, 57.

Others, again, announce the rule that the showing of a discharge by the committing magistrate is evidence of want of probable cause, sufficient to make a *prima facie* case, but does not shift the burden of proof. *Cooley on Torts*, 184; *Lawson's Rights, Rem. & Prac.*, sec. 1084; *Eastman v. Monastes*, 32 Or. 291; *Scott v. Wood*, 81 Cal. 398; *Vinal v. Core and Compton*, 18 W. Va. 1; *Rankin v. Crane*, 104 Mich. 6. This latter is, we conceive, the correct rule.

Generally, the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and there is no apparent reason for making an exception in favor of actions for malicious prosecutions, more particularly as to the issue now in consideration. The very gist of an action for malicious prosecution is want of probable cause. The truth of other material allegations, such, for example, as malice, may be inferred from proof of want of probable cause, but this allegation, being of the very substance of the issue, must be substantially and expressly proved, and is never inferred or implied from the proof of anything else. We think, therefore, that the burden of proving this issue remained upon the respondent throughout the trial, and that the court erred in charging the jury to the contrary.

The court refused to charge the jury to the effect that one partner is not liable for a malicious prosecution instituted by his co-partner, unless he advises, directs, or participates therein, even though the prosecution be purported to be instituted for some wrongful or criminal act with relation to property belonging to the firm. This was error. The rule is that a partner, as such, is not liable for a malicious prosecution instituted by his co-partner unless committed in the course of, and for the purpose of transacting, the partnership business. As a prosecution for larceny is not within the scope of a business of a mercantile partnership (the business engaged in by the appellants), there could be no presumption of participation by all of the partners, and it was necessary that this fact be proven. *Marks & Co. v. Hastings*, 101 Ala. 165; *Gilbert v. Emmons*, 42 Ill. 143; *Rosenkrans v. Barker*, 115 Ill. 331. The evidence, however, was conflicting on the question whether or not all of the appellants participated in the prosecution, and the jury should have been instructed on both sides of the question.

It is contended that the court erred in refusing to grant a nonsuit in favor of all of the appellants. This is based on the claim that the appellants fully and fairly stated all of the facts of their case to the prosecuting attorney of King county, and that the prosecution was instituted with his consent and advice. The trial court took the view that there was such a substantial dispute in the evidence as to make this question one for the jury, and instructed them on that

theory. A perusal of the record inclines us to the belief that the court correctly interpreted the evidence, and hence we find no error in its refusal to grant a nonsuit.

The judgment is reversed, and the cause remanded for a new trial.
DUNBAR, MOUNT, HADLEY, and ANDERS, JJ., concur.

ADAMS v. BICKNELL.

Supreme Court of Indiana, November, 1890. 126 Ind. 210.

THE case is stated in the opinion.

OLDS, C. J. This is an action for a malicious prosecution. The complaint alleges that in March, 1887, the appellee instituted before a justice of the peace a prosecution against the appellant, charging the appellant with having obstructed a public highway in Sullivan county, Indiana.

It appears from the averments of the complaint that the appellant was convicted before the justice of the peace, and he took an appeal to the circuit court, and was acquitted of the charge.

The complaint contains proper averments that the prosecution was malicious and without probable cause, but there are no averments that the conviction before the justice was procured by perjury or subornation of perjury on the part of the appellee, or by fraud or collusion, or any improper motives on the part of the justice.

A demurrer was sustained to the complaint, exceptions reserved to the ruling, and the ruling of the circuit in sustaining the demurrer is assigned as error.

The sole question presented is as to whether the complaint is rendered defective on account of its showing that there was a conviction of the appellant before the justice of the peace.

It is contended by counsel for appellee that the fact that the appellant was convicted by the justice, in the absence of averments that such conviction was procured by perjury or subornation of perjury on the part of the appellee, or showing that it was procured by fraud or collusion on his part, rebuts the other averments of malice and want of probable cause, and is conclusive evidence of probable cause, and exonerates the appellee from liability.

On the other hand it is contended by counsel for appellant that the appeal operated to vacate the judgment before the justice, and the cause came up in the circuit court for a trial de novo, that it is the same as if a new trial had been granted by the justice, and hence is not conclusive evidence that probable cause existed for instituting the prosecution.

The decisions of the courts are not uniform upon the question pre-

mented, but we think the great weight of authority is to the effect that the judgment of conviction of the justice's court, though appealed from, and an acquittal had in the circuit court, is, in the absence of fraud, conclusive of probable cause.

Cooley Torts (2d ed.), p. 185, states the law to be: "If the defendant is convicted in the first instance and appeals, and is acquitted in the appellate court, the conviction below is conclusive of probable cause."

Stephen, in his work on the law relating to Actions for Malicious Prosecution, p. 101, says: "It seems probable that the reversal on appeal of a conviction is not a termination favorable to the person convicted upon which he can found an action for malicious prosecution. *Reynolds v. Kennedy*, 1 Wils. 232 (1748), which has frequently been quoted as an authority, was an appeal from the Court of King's Bench in Ireland. The declaration was for seizing the plaintiff's brandy, and 'falsely and maliciously' exhibiting an information against him before the sub-commissioners of excise for not having paid duty upon it. It alleged that the sub-commissioners condemned the brandy, and that the commissioners of appeal 'most justly reversed the judgment of the sub-commissioners.' It was held that as to the information before the sub-commissioners the declaration showed a foundation for the prosecution, and that as to the appeal 'we cannot infer from the judgment of reversal of the commissioners of appeal, that the defendant, the prosecutor, was guilty of malice.'"

In *Griffs v. Sellers*, 8 Dev. and Bat. Law, 492 (N. C.) (31 Am. Dec. 422), a well reasoned case, it is held that where there were a trial and conviction in the county court, and an appeal taken to the superior court where the defendant was acquitted, it was conclusive of probable crime,¹ and that the defendant in such case could not maintain an action for malicious prosecution, and the declaration was held bad for this reason.

In the case of *Clements v. Odorless, etc., Co.*, 8 Central Rep., p. 901, the Supreme Court of Maryland, in an action for malicious prosecution, where there had been a judgment in favor of the defendant, in the cause upon which the prosecution was based, which judgment had been reversed, said: "It was the deliberate judgment of a court of competent jurisdiction that there was not only a probable cause for filing the bill for injunction, but that the appellee was entitled to the relief prayed. A judgment thus rendered ought to be considered conclusive as to the question of probable cause, although it was reversed on appeal by the Supreme Court; otherwise, in every case of reversal an action would lie for the institution of the original suit."

Whitney v. Peckham, 15 Mass. 248, is a case directly in point; the plaintiff in that case was arrested for an alleged assault and battery,

¹ Sic, for cause.

and tried and convicted before a justice. On appeal to the circuit court of common pleas he was acquitted. The Supreme Court held that the conviction before the justice, he having jurisdiction of the subject-matter, was conclusive evidence that there was probable cause. *Parker v. Huntington*, 2 Gray, 124; *Parker v. Farley*, 10 Cushing, 279.

In *Bitting v. Ten Eyck*, 82 Ind. 421, it is said by this court: "The conviction of the plaintiff is always evidence of probable cause, unless it was obtained chiefly or wholly by the false testimony of the defendant; generally, it is conclusive evidence of probable cause." It is further said: "And it has been held sufficient evidence of probable cause to show that the plaintiff was convicted of the offence before a justice of the peace who had jurisdiction, although he was afterwards acquitted on an appeal."

These decisions are in accordance with other holdings in regard to the law governing malicious prosecutions.

The burden of proof rests upon the plaintiff, in such cases, to prove the want of probable cause; and in this class of cases it has been held that where one lays all the facts before counsel, and acts in good faith upon an opinion given, it exonerates him from liability.

In *Cooley*, Torts, p. 183, Mr. Cooley says: "It may perhaps turn out that the complainant, instead of relying upon his own judgment, has taken the advice of counsel learned in the law, and acted upon that. This should be safer and more reliable than his own judgment, not only because it is the advice of one who can view the facts calmly and dispassionately, but because he is capable of judging of the facts in their legal bearings. A prudent man is therefore expected to take such advice; and when he does so, and places all the facts before his counsel, and acts upon his opinion, proof of the fact makes out a case of probable cause, provided the disclosure appears to have been full and fair, and not to have withheld any of the material facts," and this doctrine is adhered to by this court, and is distinctly and clearly stated in the case of *Paddock v. Watts*, 116 Ind. 146, 151, as follows:

"Where one lays all the facts before counsel, and acts in good faith upon an opinion given, he is not liable to an action, even though it turns out that he was mistaken. But in order that he may obtain immunity, he must have made a full and fair statement of all the facts known to him."

When the question arises upon the evidence it is usually a controverted fact as to whether the defendant did make a full and fair statement of all the facts known to him, and acted in good faith on the opinion given; but should it affirmatively appear in a complaint that the defendant did make a full and fair statement to counsel, and in good faith acted upon an opinion given, it would seem that it would show a case of probable cause on the part of the defendant,

and render the complaint insufficient to withstand a demurrer; or if such a state of facts should be pleaded as a defence, it would be good to withstand a demurrer.

If it be a good defence, then it destroys the plaintiff's right of action when it is fully stated in his complaint.

One of the reasons upon which this rule is based is that when the prosecuting witness acts upon facts which are of such a character that when they are stated to a calm and dispassionate person, capable of judging, they lead him to conclude the person charged is guilty, they are such as to make a case of probable cause on which the prosecuting witness has the right to act; so in relation to a case like the one at bar, if the facts are such as lead a court of competent jurisdiction to try the offence, to act upon them and find the defendant guilty, it makes out a case of probable cause, and conclusively exonerates the prosecuting witness from liability, although an appeal may be taken and an acquittal had in the appellate court.

As said in *Paddock v. Watts*, supra, "Where one lays all the facts before counsel, and acts in good faith upon an opinion given, he is not liable to an action even though it turn out that he was mistaken."

So it may be said in a case where the judgment of conviction is appealed from and an acquittal had. If the prosecuting witness presented the facts to one court, competent to try the cause, and the court found the defendant guilty, it makes out a case of probable cause, and exonerates him from liability though that court erred in its judgment. This is undoubtedly the true rule.

It is the duty of citizens when they are in possession of facts which, when fully and fairly presented to a calm and dispassionate lawyer, capable of determining whether such facts constitute a crime such as should be prosecuted and punished, or sufficient when presented to a court having jurisdiction to try the offence, to lead the court to act upon them, and find the defendant guilty, to take legal steps for the punishment of such offenders, and they should, when they act in good faith upon such facts, be exonerated from any liability in an action for malicious prosecution.

If it was averred or shown by the complaint in this case that such conviction had been procured by perjury or subornation of perjury on the part of the appellee, or by any fraud or collusion on his part, it would present a different question, but it contains no such averments.

The conclusion we have reached being in harmony with the ruling of the circuit court, the judgment must be affirmed.

Judgment affirmed, with costs.

OLMSTEAD v. PARTRIDGE.

Supreme Court of Massachusetts, October, 1860. 16 Gray, 381.

ACTION of tort for a malicious prosecution by making a complaint to a justice of the peace, charging the plaintiff with larceny of one hundred sticks of wood, upon which the plaintiff was arrested and tried before a trial justice and discharged.

At the trial in the Court of Common Pleas at April term, 1859, Aiken, J., admitted in evidence, against the defendant's objection, a certified copy of the record of the proceedings in that prosecution, without calling either the magistrate who received the complaint and issued the warrant, or the one who tried the case.

The defendant called the justice of the peace to whom the complaint was addressed, but who was not a counsellor or attorney at law, and offered to prove by him that the defendant, at the time of making the complaint, applied to him for advice and counsel, and stated that she had caught the plaintiff with two sticks of the defendant's wood in her arms. But the evidence was objected to and rejected.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

BIGELOW, C. J. 1. The copy of the record of proceedings before the magistrate was not only competent, but it was the only proper and legitimate method of proving the essential fact of the institution of the prosecution. *Stone v. Crocker*, 24 Pick. 87. *Sayles v. Briggs*, 4 Met. 421.

2. In actions for malicious prosecution, it has been held to be competent for the defendant to prove, in order to establish the fact of probable cause, that in prosecuting the plaintiff on a criminal charge he acted in accordance with the advice of counsel on a full and correct statement of all the material facts bearing on the case. *Hewlett v. Cruchley*, 5 Taunt. 277. *Ravenga v. Mackintosh*, 2 B. & C. 693. *Stone v. Swift*, 4 Pick. 393. But such testimony has always been limited to communications with counsel or attorneys. Statements made to other persons and advice given by them have never been deemed admissible. The law wisely requires that a party who has instituted a groundless suit against another should show that he acted on the advice of a person who by his professional training and experience and as an officer of the court may be reasonably supposed to be competent to give safe and prudent counsel on which a party may act honestly and in good faith, although to the injury of another. But it would open the door to great abuses of legal process, if shelter and protection from the consequences of instituting an unfounded prosecution could be obtained by proof that a party acted on the irresponsible advice of one who could not be presumed to have better

means of judging of the rights and duties of the prosecutor on a given state of facts than the prosecutor himself.

Exceptions overruled.

VANDERBILT *v.* MATHIS.

Superior Court of New York City, February, 1856. 5 Duer, 304.

THE plaintiff complained that the defendant had falsely, maliciously, and without any reasonable or probable cause, charged him with committing perjury in a certain case before R. E. Stilwell, a commissioner of the United States for the Southern District of New York, whereupon the plaintiff was arrested and brought before said commissioner, and upon examination acquitted.

The errors of law alleged are stated in the opinion.

BOSWORTH, J. To maintain an action for malicious prosecution, three facts, if controverted,¹ must be established: 1. That the prosecution is at an end, and was determined in favor of the plaintiff. 2. The want of probable cause. 3. Malice. In such an action it is necessary to give some evidence of the want of probable cause. It is insufficient to prove a mere acquittal; that, alone, is not *prima facie* evidence of the want of probable cause.² *Gorton v. De Angelis*, 6 Wend. 418.

It is equally essential that the former prosecution should appear to have been maliciously instituted. Malice may be inferred from the want of probable cause, but such an inference is one which a jury is not required to make, at all events merely because they may find the absence of probable cause. Unless the evidence, in relation to the circumstances under which the prosecution was ended, and that given to establish the want of probable cause, justify the inference of malice, other evidence, in support of it, must be given. Evidence as to the conduct of the defendant, in the course of the transaction, his declarations on the subject, and any forwardness and activity in exposing the plaintiff by a publication, are properly admitted to prove malice. Such evidence must be given as will justify a jury in finding the existence of malice. The rule is uniformly stated, that, to maintain an action for a former prosecution, it must be shown to have been without probable cause, and malicious. *Vanduzer v. Linderman*, 10 Johns. R. 106; *Murray v. Long*, 1 Wend. 140; 2 Stark. Ev. 494; *Willans v. Taylor*, 6 Bing. 183.

The judge, at the trial, charged that the fact that the plaintiff was discharged before the magistrate showed, *prima facie*, that there was no probable cause for the arrest, and shifted the burden of proof from the plaintiff to the defendant, who was bound to show affirma-

¹ The words "if controverted" are used here inadvertently, it seems.

² See *Noblett v. Bartsch*, ante, p. 249.

tively that there was probable cause. He was requested to charge "that the discharge of Vanderbilt was not *prima facie* evidence of the want of probable cause." This he refused to do. To this refusal to charge, and to the charge as made, the defendant excepted.

He also charged "that, if probable cause is made out, the question of malice becomes immaterial, except as bearing on the question of damages." "This question of malice in fact, supposing that probable cause did not exist, is material only as affecting the question of damages." He was requested to charge "that the jury could not find a verdict for the plaintiff, unless he has proved that there was no probable cause for the complaint, and not even then, unless they believe, from the evidence, that, in making the complaint, the defendant acted from malicious motives." This the judge declined to do, and to his refusal so to charge the defendant excepted.

Although the evidence which establishes the want of probable cause may be, and generally is, such as to justify the inference of malice, yet we understand the rule to be, that when it is a just and proper inference from all the facts and circumstances of the case, upon all the evidence given in the cause, "that the defendant was not actuated by any improper motives, but only from an honest desire to bring a supposed offender to justice, the action will not lie, because such facts and circumstances disprove that which is of the essence of the action, viz., the malice of the defendant in pressing the charge."

In *Bulkeley v. Smith*, 2 Duer, 271, the court stated the rule to be, "that, in order to maintain a suit for a malicious prosecution, the plaintiff is bound to prove the entire want of a probable cause for the accusation, and the actual malice of the defendant in making it. Malice is a question of fact, which, when the case turns upon it, must be decided by the jury." Story, J., in *Wiggin v. Coffin*, 3 Story, 1, instructed the jury that two things must concur to entitle a plaintiff to recover in such an action. "The first is, the want of probable cause for the prosecution; the second is, malice in the defendant in carrying on the prosecution. If either ground fail, there is an end of the suit." In *Vanduzer v. Linderman*, 10 Johns. R. 106, the court said: "No action lies merely for bringing a suit against a person without sufficient ground. To maintain a suit for a former prosecution, it must appear to have been without cause and malicious."

If the charge must be understood to mean, that if the want of probable cause was established, the plaintiff was entitled to recover, although the jury should believe, from the whole evidence, that in making the complaint the defendant did not act from malicious motives, then we deem it to be erroneous. This construction is the only one of which the language of the instruction appears to be susceptible; for the judge, in charging the jury, stated that the "question of malice in fact, supposing that probable cause did not exist, is material only as affecting the question of damages."

Malice in fact is that kind of malice which is to be proved. When malice may be and is inferred from the want of probable cause, it is actual malice which is thus proved. There is no theoretical malice which can satisfy this rule, and which can coexist with the established fact, that the prosecution was instituted in an honest belief of the plaintiff's guilt, and with no other motives than to bring a supposed offender to justice. The question of malice may be a turning-point of the controversy, in an action of this nature.

The want of probable cause may be shown, and yet upon the whole evidence in any given case it may be a fair question for the determination of a jury, whether the defendant was actuated by malice. If the whole evidence is such that a jury cannot properly doubt the honesty and purity of the motive which induced the former prosecution, and if they fully believe that it was instituted from good motives, and in the sincere conviction that the plaintiff was guilty of the offence charged, and without malice, the defendant would be entitled to a verdict.

The charge made, and which was excepted to, must be deemed to have been made to give the jury a rule of action, in disposing of the case upon the whole evidence. We think it was not only calculated to mislead, but was erroneous.

A new trial must be granted, with costs to abide the event.

EASTIN *v.* BANK OF STOCKTON.

Supreme Court of California, November, 1884. 66 Cal. 123.

THE case is stated in the opinion.

ROSS, J. The cause of action set forth in the complaint is, that in the month of August, 1874, the plaintiff executed to the firm of J. H. Barney & Co. his two certain promissory notes — one for the sum of \$160, and the other for the sum of \$341 — which notes he paid in December of the same year at the Bank of Stockton, with the knowledge of the president, cashier and managing agent of the bank; that after the notes had been so paid and had been delivered up, plaintiff lost them; and the bank, by some means to the plaintiff unknown, became possessed of them; that thereafter, and in the year 1876, the bank and its co-defendant, Hogan, entered into a conspiracy for the purpose of blackmailing plaintiff, and extorting money from him by means of the possession of the notes and the supposed inability of the plaintiff to produce evidence of their payment, and that it was agreed and understood between the bank and Hogan that each should receive an equal part of whatever money they might succeed in extorting from the plaintiff, and that each should bear an equal part of the expenses incurred in carrying out the conspiracy; that in pursuance of the

conspiracy, defendants, on the 5th of August, 1878, wilfully, maliciously, and without reasonable or probable cause, and with intent to vex, harass and injure the credit of plaintiff, and to put him to cost in and about his defence, or to compel him to submit to their extortionate demands, commenced an action in the district court of the Fifth Judicial District of the State of California, for the recovery of the sums for which the notes had been given, but which defendants at the time well knew had been fully paid; that process in that action was served on the present plaintiff, who was obliged to employ counsel to defend the suit at a cost of \$600, and to incur a further expenditure in defence thereof of \$75; that by reason of the commencement and prosecution of that action the plaintiff was damaged in the further sum of \$5,000, by way of injury to his credit, neglect of his business, etc.; that the action resulted in a judgment for the then defendant — plaintiff here.

The answer of the defendants put in issue the material averments of the complaint, and a trial was had with a jury, resulting in a verdict for the plaintiff for the sum of \$3,000; and judgment was entered against the defendants for that sum and costs.

A large number of objections were taken by the defendants to the proceedings in the court below — among them exceptions to the giving and the refusal to give certain instructions to the jury. The instructions given were erroneous in several particulars. In several instances the jury was told, in effect, that it was for them to decide whether or not there was probable cause for the prosecution of the suit against the plaintiff. Thus, the court told the jury: "If, from the evidence, you find that in the instituting of the suit of the Bank of Stockton v. Eastin there was no probable cause, and that the defendants were actuated by malice, either actual or implied, then I charge you that in assessing the damages sustained by Eastin, you are not limited to the actual amount paid out or expended by him," etc. Again, the jury was told: "If the facts offered to show a want of probable cause are undisputed, it is the sole province of the court to determine whether or not such evidence establishes a want of probable cause, and in that case the jury would have nothing to do with the matter. If, however, the facts are disputed, then it becomes your duty first to determine what are the facts proven, and *next*, under the instructions of the court, *to see whether those facts constitute a want of probable cause*. Now, in this case, that is a disputed proposition, and unless you find affirmatively from the testimony that there was a want of probable cause in the institution of the suit of the Bank of Stockton v. Eastin, then you must find for the defendants." Continuing, the court said: "In determining whether or not there was a want of probable cause in the bringing of that suit, the court calls your attention particularly to the fact which, in its judgment, will determine that question either one way or the other."

It is quite clear that by these instructions the court left it with the jury to say whether or not there was probable cause for the bringing of the suit against the plaintiff. In doing so, the court committed to the jury more than it was their legitimate province to determine, as was held in *Grant v. Moore*, 29 Cal. 652, and where this court said: "The law makes it the duty of the judge who tries an action for malicious prosecution, to instruct the jury that as they may find and determine certain questions of fact, properly submitted to them, to be true or untrue, so must be their verdict for the plaintiff or the defendant; not that they should determine the question of the want of probable cause, or the contrary."

The court below also erred in instructing the jury, as it did, that in the event of their finding a verdict for the plaintiff, it would be their duty to allow him all that he paid out and expended in the defence of the former suit, "both counsel fees and all other expenses paid out by him," without reference to whether such counsel fees and other expenses were reasonable and proper or not. Under no circumstances would plaintiff be entitled to recover extravagant and unnecessary fees and expenses.

As the case must be sent back for a new trial, it is proper to decide another question raised, and that is, whether in this State an action can be maintained for the malicious prosecution of a civil action, in which no process other than the summons was issued. The weight of the authorities, American as well as English, is against the maintenance of such an action; and so are most of the text-writers. The question has never been determined in this State, and we are, therefore, at liberty to adopt the rule that we think is founded on the better reason. The point was made in the case of *Smith v. George*, 52 Cal. 344, but was not decided, the Court holding that it was unnecessary to decide it, but remarking that "the adjudged cases in England and America are conflicting upon the question, and depending to a considerable degree, it would seem, upon the prevailing statutory provisions as to the recovery of costs by the defendant upon the termination of a civil action in his favor." The cases are collected and reviewed by Mr. Lawson, in an instructive article upon the subject, published in the *American Law Register*, and which will be found in the 21st vol., at pages 281-353. The cases are too numerous to be here referred to in detail. The English cases which deny the right to maintain the action, stand upon the ground that the successful defendant is adequately compensated for the damages he sustains by the costs allowed him by the statute. Those costs, it seems, include the attorney's charges for preparing the case for trial in all its parts, the fees of the witnesses and the court officials, and even the honorarium of the barrister who conducted the case in court. The reason upon which the English rule rests would not, therefore, seem to apply here, where the costs re-

coverable under the statute are confined to much narrower limits. Under our system the defendant may be subjected, or he may subject himself, to expenses not recoverable, even if the suit terminates in his favor; but of this he has no legal ground to complain when the suit is brought and prosecuted in good faith, because, as said in *Closson v. Staples*, 42 Vt. 209, "it is the ordinary and natural consequence of a uniform and well-regulated system, to which all parties in civil actions are required to conform. But when the action is brought and prosecuted maliciously, and without reasonable or probable cause, the plaintiff asserts no claim in respect to which he had any right to invoke the aid of the law. In such cases the plaintiff, by an abuse of legal process, unjustly subjects the defendant to damages which are not fully compensated by the costs he recovers. The plaintiff, in such case, has no legal or equitable right to claim that the rule of law which allows a suit to be brought and prosecuted in good faith without liability of the plaintiff to pay the defendant damages, except by way and to the extent of the taxable costs, if judgment be rendered in his favor, should extend to a case where the suit was maliciously prosecuted without probable cause. But where the damages sustained by the defendant in defending a suit maliciously prosecuted without reasonable or probable cause exceed the costs obtained by him, he has, and of right should have, a remedy by action on the case."

Two other objections made to the maintenance of the action — first, the claim that if such suits are allowed, litigation will become interminable, because every successful action will be followed by another, alleging malice in the prosecution of the former; and second, that if the defendant may sue for damages sustained by an unfounded prosecution, the plaintiff may equally bring an action when the defendant makes a groundless defence, — are well answered in the article already alluded to: "To the first objection, it is enough to say that the action will never lie for an unsuccessful prosecution, unless begun and carried on *with malice and without probable cause*. With the burden of this difficult proof upon him, the litigant will need a very clear case, before he will be willing to begin a suit of this character. The second argument fails to distinguish between the position of the parties, plaintiff and defendant, in an action at law. The plaintiff sets the law in motion; if he does so groundlessly and maliciously, he is the cause of the defendant's damage. But the defendant stands only on his legal rights — the plaintiff having taken his case to court, the defendant has the privilege of calling upon him to prove it to the satisfaction of the judge or jury, and he is guilty of no wrong in exercising this privilege."

Judgment and order reversed, and cause remanded for a new trial.

Myrick, J., McKinstry, J. Morrison, C. J., and Thornton, J., concurring.

PART II.

INCULPABLE MIND.

ILLEGAL ACTS.

CHAPTER VI.

ABUSE OF PROCESS AND UNWARRANTED ATTACHMENT.

GRAINGER *v.* HILL.

Common Pleas of England, Hilary Term, 1838. 4 Bing. N. C. 212.

THE declaration stated that the plaintiff, before the time of the committing of the grievances by the defendants hereinafter mentioned, was master and proprietor of a certain smack or vessel, hereinafter mentioned; and the plaintiff, being such proprietor, and having occasion to borrow a certain sum of money to meet his needs, applied to and requested the defendants to lend and advance to him the sum of £80, which they, the defendants, agreed to do, upon having the repayment thereof secured to them by a mortgage of the said smack or vessel; and it was thereupon agreed by and between the plaintiff and defendants that a mortgage of the said vessel should be accordingly made and given; and that the sum of money so to be advanced and lent by the defendants to the plaintiff should afterwards be repaid by the plaintiff to the defendants on a certain time then agreed upon, and not yet elapsed, to wit, the 28th of September, 1837; and that in the mean time the plaintiff should retain the command of the said smack or vessel, and prosecute and make voyages therein for his own profit and advantage; and thereupon, afterwards, to wit, on the 30th of September, 1836, the defendants accordingly lent and advanced to the plaintiff, upon and in pursuance of the said agreement, and upon the security aforesaid, the said sum of £80; and the plaintiff also thereupon, in pursuance also of the said agreement, by a certain indenture then made, signed, sealed, and delivered by the defendants of the one part and the plaintiff of the other part (the indenture was here set out), mortgaged the said vessel, subject to a proviso of redemption on payment of £80, together with interest for the same in the mean time, at and after the rate of five per cent per annum, on the 28th of September, 1837,

then and now next ensuing; and the plaintiff did, in and by the said indenture, covenant, promise and agree to and with the defendants that the plaintiff should well and truly pay, or cause to be paid, to the defendants the said sum of £80, with interest for the same, after the rate aforesaid, at or on the day and time therein and hereinbefore expressed and appointed for payment of the same. That the defendants wrongfully, illegally, and maliciously contriving to injure, harass, and distress the plaintiff, and to compel the plaintiff, by and through fear and duress of imprisonment, to give up and relinquish to them certain goods and chattels of and belonging to the plaintiff, and not included in the said mortgage security, to wit, a certain register and a certain certificate of the register of the said smack or vessel, and without the possession of which the plaintiff could not go to sea or prosecute his said voyages in manner aforesaid as agreed upon by and between the plaintiff and defendants, as the defendants well knew, long before the said time so appointed as aforesaid for the payment of the said sum of £80, to wit, on, &c., called upon and requested payment of and from the plaintiff of the said sum of £80, and then threatened to arrest him for the same unless he immediately paid to them the amount thereof. That, upon the plaintiff's refusing so to do, the defendants wrongfully and unjustly contriving and intending as aforesaid, and to imprison, harass, oppress, injure, and impoverish the plaintiff, and to cause and procure him to be arrested and imprisoned, and to prevent his making and prosecuting any voyages whatsoever in his said smack or vessel, and wholly to ruin the plaintiff thereby, well knowing that the plaintiff was wholly unprepared and unprovided with bail, heretofore, to wit, on the 26th of November, 1836, falsely and maliciously caused and procured to be sued and prosecuted out of the court of our lord the king of the bench at Westminster, for the said sum of £80, a certain writ of our lord the king called a *capias* (setting it out). That the defendants, contriving and intending as aforesaid, afterwards, to wit, on, &c., wrongfully, illegally, and maliciously caused and procured the said writ to be, and the same was then, marked and indorsed for bail for £95 17s. 6d., being the sum of £80, and certain alleged costs, charges, and expenses, making together the sum of £95 17s. 6d.; and the said writ being indorsed for bail as aforesaid, the defendants afterwards and before the return thereof, to wit, on, &c., contriving and intending as aforesaid, wrongfully and maliciously caused the plaintiff to be, and he then was, arrested by his body, under and by virtue of the said writ, and was thereupon imprisoned, and kept and detained in prison for a long time, to wit, for the space of twelve hours then next following, until he, the plaintiff, not being prepared or provided with bail to the said action, by and through fear and duress of imprisonment, was forced and compelled to give up and relinquish to them the goods and chattels before men-

tioned, to wit, the said register and certificate of registry, and did so give up and relinquish the same; and the defendants thence hitherto wrongfully and unjustly, and against the consent and will of the plaintiff, forcibly and against law kept and detained the same from the plaintiff. By means of which said several premises, the plaintiff being, as the defendants before and after the time of the said arrest well knew, wholly unprepared and unprovided with bail, whilst he was so imprisoned as aforesaid, not only suffered great pain of body and mind, and was greatly exposed and injured in his credit and circumstances, and was hindered and prevented from performing and transacting his lawful business and affairs by him during that time to be performed and transacted, but especially was prevented and deterred from making and prosecuting with the said smack or vessel, divers, to wit, four several voyages with and in the said smack or vessel, to wit, from London to Caen and back again, and lost and was deprived thereby of all the benefits, profits, and advantages which would have otherwise flowed and accrued to him the plaintiff therefrom, and was by means of the premises otherwise greatly injured and damnified.

There was a count in trover for a ship's register. The defendants pleaded the general issue.

At the trial it appeared that in September, 1836, the plaintiff, by deed, mortgaged to the defendants for £80 a vessel of which he was owner as well as captain. The money was to be repaid in September, 1837; and the plaintiff was to retain the register of the vessel in order to pursue his voyages.

In November, 1836, the defendants, under some apprehension as to the sufficiency of their security, resolved to possess themselves of the ship's register, and for this purpose, after threatening to arrest the plaintiff unless he repaid the money lent, they made an affidavit of debt, sued out a *capias* indorsed for bail in the sum of £95 17s. 6*d.* in an action of *assumpsit*, and sent two sheriff's officers with the writ to the plaintiff, who was lying ill in bed from the effects of a wound. A surgeon present, perceiving he could not be removed, one of the defendants said to the sheriff's officers, "Don't take him away; leave the young man with him." The officers then told the plaintiff that they had not come to take him, but to get the ship's register; but that if he failed to deliver the register, or to find bail, they must either take him, or leave one of the officers with him. The plaintiff, being unable to procure bail, and being much alarmed, gave up the register.

The plaintiff afterwards came to an arrangement with the defendants, was discharged from the arrest, paid the costs, repaid the money borrowed on mortgage, and received from the defendants a release of the mortgage deed. No further steps were taken in the action of *assumpsit*. Upon this arrangement a caption fee, which had

been charged and paid by the plaintiff to the sheriff's officers, was repaid by the defendants to the plaintiff. Verdict for plaintiff; motion for nonsuit, and in arrest of judgment.

TINDAL, C. J. . . . [After stating the facts the Chief Justice proceeded:]

The first ground urged for a nonsuit is, that the facts proved with respect to the writ of *capias* do not amount to an arrest. It appears to me that the arrest was sufficiently established.

The second ground urged for a nonsuit is, that there was no proof of the suit commenced by the defendants having been terminated. But the answer to this, and to the objection urged in arrest of judgment, namely, the omission to allege want of reasonable and probable cause for the defendants' proceeding, is the same; that this is an action for abusing the process of the law, by applying it to extort property from the plaintiff, and not an action for a malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved, and the absence of reasonable and probable cause be alleged as well as proved. In the case of a malicious arrest, the sheriff at least is instructed to pursue the exigency of the writ. Here the directions given, to compel the plaintiff to yield up the register, were no part of the duty enjoined by the writ. If the course pursued by the defendants is such that there is no precedent of a similar transaction, the plaintiff's remedy is by an action on the case, applicable to such new and special circumstances; and his complaint being that the process of the law has been abused, to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause.

As to the count in *trover*, if the taking of the register was wrongful, that taking was of itself a conversion, and no demand and refusal was necessary as a preliminary to this action. It seems to me that taking the property of another without his consent, by an abuse of the process of the law, must be deemed a wrongful taking, and therefore this rule must be discharged.

Park, Vaughan and Bosanquet, JJ., delivered concurring opinions.

Rule discharged.

ZINN *v.* RICE.

Supreme Court of Massachusetts, May, 1891. 154 Mass. 1.

TORT, to recover damages for alleged wrongful acts of the defendant, in that, in an action of contract brought by him against the plaintiff to recover the sum of \$4,522.45, he maliciously placed the ad damnum in the writ at \$40,000, and maliciously caused to be made various attachments, each in the sum last named, upon the real and personal property of the plaintiff, to his great damage.

At the trial in the Superior Court, before Lathrop, J., the plaintiff offered to prove that the defendant on February 7, 1889, sued out a writ in an action of contract, in which the damages were laid at \$40,000; that on February 9 two successive attachments, each in the sum of \$40,000, were, under the defendant's instructions, placed on the plaintiff's real estate, which was worth many times the amount owed to the defendant by the plaintiff; that on February 12, 1889, the defendant caused an attachment in the same sum to be placed upon the plaintiff's stock of goods and merchandise, valued at about \$100,000, situated in his stores in Boston, and a keeper was put over the same who remained there for two days; that at this time the plaintiff was, as the defendant knew, absent from the Commonwealth for the benefit of his health; that subsequently, in the absence of the plaintiff and upon the statement of his counsel, an order was obtained in the Superior Court reducing the ad damnum in the writ to \$10,000; that the defendant did what he did maliciously, and for the avowed purpose of injuring the plaintiff; and that by these acts of the defendant the plaintiff had been greatly damaged. It also appeared that the original action in which the attachments were made had not been terminated when the present action was brought, but was still pending before an auditor.

The judge ruled that the present action was prematurely brought, and ordered a nonsuit to be entered; and the plaintiff alleged exceptions.

W. ALLEN, J. It is not contended that the facts alleged in the declaration and offered to be proved at the trial are not sufficient to sustain an action by the plaintiff against the defendant. The defendant's contention is, that the action is prematurely brought; that it is an action for malicious prosecution, and subject to the rule that a suit for malicious prosecution cannot be maintained until the prosecution has terminated in favor of the plaintiff. But the rule applies only to suits for maliciously instituting groundless prosecutions, and does not apply to the injurious and malicious use of process in proceedings which were commenced with probable cause. The latter,¹ being for the malicious use of legal process by acts authorized

¹ Sic for former.

by its terms, may be called actions for malicious prosecution, to distinguish them from actions for the abuse of process by doing, under color of legal process, acts not authorized by it; but there is no rule of law that in such an action the termination of any former suit must be shown. The rule is founded on the necessity of proving that a prosecution which itself puts in issue the truth of the charge on which it is founded is without probable cause. A defendant in such an action cannot bring another action to try the issue tendered him in the first, while that issue is pending. The rule is by its terms and nature limited to a prosecution to establish a charge or cause of action, and cannot include an *ex parte* use of process incidental and collateral to such a prosecution, and in defence to which falsity of the charge cannot be shown. *Parker v. Langly*, 10 Mod. 209. *Fortman v. Rottier*, 8 Ohio St. 548. *Bump v. Betts*, 19 Wend. 421. *Barnett v. Reed*, 51 Penn. St. 190. *Jenings v. Florence*, 2 C. B. (N. S.) 467. *Churchill v. Siggers*, 3 El. & Bl. 929. *Wentworth v. Bullen*, 9 B. & C. 840. *Savage v. Brewer*, 16 Pick. 453. *Bicknell v. Dorion*, 16 Pick. 478. *Wood v. Graves*, 144 Mass. 365. *Everett v. Henderson*, 146 Mass. 89.¹

In the case at bar the grievance of the plaintiff is not that the defendant maliciously commenced a groundless suit. He admits that the defendant had a good cause of action, and that there is no defence to the suit, and that its termination cannot be in his favor. Nor is his grievance that the defendant abused the process in the former suit, and under color of it did things not authorized by its terms. His grievance is that the defendant, having a just cause of action and a legal suit against this plaintiff, made an excessive attachment of property which he knew was not needed for the security of his debt, not for the purpose of securing his debt, but for the purpose of injuring the plaintiff. If the plaintiff has any right of action, which is not controverted, it is idle to say that he must wait until the former action has terminated in his favor.

The defendant contends that the amount of the debt must be fixed by the determination of the former suit, and that it cannot be shown in this suit. We know of no authority or reason for this. The amount of the debt cannot exceed the amount declared for in the suit, and that is admitted to be due so far certainly as affects this suit. Beyond that there is no question in the former suit, and no issue, and the proceedings complained of were *ex parte*, and they were terminated by the reduction of the attachment. It is argued that the plaintiff in that suit may amend his declaration, and introduce a new cause of action. That case, as stated by the plaintiff himself, does not present any issue involved in the case at bar, and the possibility that a new cause of action may be added, if it existed, would not be sufficient to show that the issues presented in this case are pending in that,

¹ Post, p. 286.

or to bring it within the terms or reason of the rule that the liability of this plaintiff to such possible cause of action can be tried only in that action.

Exceptions sustained.

CHAPTER VII.

FALSE IMPRISONMENT.

BIRD v. JONES.

Queen's Bench of England, 1845. 7 Q. B. 742.

VERDICT for the plaintiff in an action for false imprisonment, and rule nisi for a new trial. The judgments explain the nature of the case.

Cur. adv. vult.

COLERIDGE, J. In this case, in which we have unfortunately been unable to agree in our judgment, I am now to pronounce the opinion which I have formed; and I shall be able to do so very briefly because, having had the opportunity of reading a judgment prepared by my brother Patterson, and entirely agreeing with it, I may content myself with referring to the statement he has made in detail of those preliminary points in which we all, I believe, agree, and which bring the case up to that point upon which its decision must certainly turn and with regard to which our difference exists.

This point is whether certain facts, which may be taken as clear upon the evidence, amount to an imprisonment. These facts, stated shortly, and as I understand them, are in effect as follows:—

A part of a public highway was inclosed and appropriated for spectators of a boat-race, paying a price for their seats. The plaintiff was desirous of entering this part, and was opposed by the defendant; but after a struggle, during which no momentary detention of his person took place, he succeeded in climbing over the inclosure. Two policemen were then stationed by the defendant to prevent, and they did prevent, him from passing onwards in the direction in which he declared his wish to go; but he was allowed to remain unmolested where he was, and was at liberty to go, and was told that he was so, in the only other direction by which he could pass. This he refused for some time, and during that time remained where he had thus placed himself.

These are the facts; and setting aside those which do not properly bear on the question now at issue, there will remain these: that the plaintiff, being in a public highway and desirous of passing along it in a particular direction, is prevented from doing so by the orders of the defendant, and that the defendant's agents for the purpose

are policemen, from whom indeed no unnecessary violence was to be anticipated, or such as they believed unlawful, yet who might be expected to execute such commands as they deemed lawful with all necessary force, however resisted. But although thus obstructed, the plaintiff was at liberty to move his person and go in any other direction at his free will and pleasure; and no actual force or restraint on his person was used, unless the obstruction before mentioned amounts to so much.

I lay out of consideration the question of right or wrong between these parties. The acts will amount to imprisonment neither more nor less from their being wrongful or capable of justification.

And I am of opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible or, though real, still in conception only; it may itself be movable or fixed: but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom. It is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own.

In Com. Dig. Imprisonment (G) it is said: "Every restraint of the liberty of a free man will be an imprisonment." For this the authorities cited are 2 Inst. 482; Cro. Car. 210 (a). But when these are referred to, it will be seen that nothing was intended at all inconsistent with what I have ventured to lay down above. In both books the object was to point out that a prison was not necessarily what is commonly so called, a place locally defined and appointed for the reception of prisoners. Lord Coke is commenting on the statute of Westminster 2d,¹ "in prisona," and says, "every restraint of the liberty of a free man is an imprisonment although he be not within the walls of any common prison." The passage in Cro. Car.² is from a curious case of an information against Sir Miles Hobert and Mr. Stroud for escaping out of the Gate House Prison, to which they had been committed by the King. The question was whether, under the circumstances, they had ever been there imprisoned. Owing to the sickness in London, and through the favor of the keeper, these gentlemen had not, except on one occasion, ever been within the walls of the Gate House. The occasion is somewhat singularly expressed in the decision of the court, which was "that their *voluntary* retirement to

¹ 1 Stat. 13 Edw. I. c. 48.

² Hobert & Stroud's Case, Cro. Car. 209.

the close stool" in the Gate House "made them to be prisoners." The resolution however in question is this: "that the prison of the King's Bench is not any local prison confined only to one place, and that *every place* where any person is restrained of his liberty is a prison; as if one take sanctuary and depart thence, he shall be said to break prison."

On a case of this sort, which if there be difficulty in it is at least purely elementary, it is not easy nor necessary to enlarge; and I am unwilling to put any extreme case hypothetically. But I wish to meet one suggestion which has been put as avoiding one of the difficulties which cases of this sort might seem to suggest. If it be said that to hold the present case to amount to an imprisonment would turn every obstruction of a right of way into an imprisonment, the answer is, that there must be something like personal menace or force accompanying the act of obstruction, and that, with this, it will amount to imprisonment. I apprehend that is not so. If, in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street, I should have no difficulty in saying that the inhabitants were thereby imprisoned; but if only one end were walled up, and an armed force stationed outside to prevent any scaling of the wall or passage that way, I should feel equally clear that there was no imprisonment. If there were, the street would obviously be the prison, and yet as obviously none would be confined to it.

Knowing that my lord has entertained strongly an opinion directly contrary to this, I am under serious apprehension that I overlook some difficulty in forming my own; but if it exists, I have not been able to discover it, and am therefore bound to state that, according to my view of the case, the rule should be absolute for a new trial.

WILLIAMS, J. . . . A part of Hammersmith Bridge, which is generally used as a public footway, was appropriated for seats to view a regatta on the river, and separated for that purpose from the carriage way by a temporary fence. The plaintiff insisted upon passing along the part so appropriated, and attempted to climb over the fence. The defendant (clerk of the Bridge Company) pulled him back; but the plaintiff succeeded in climbing over the fence. The defendant then stationed two policemen to prevent, and they did prevent, the plaintiff from proceeding forwards along the footway in the direction he wished to go. The plaintiff however was at the same time told that he might go back into the carriage way and proceed to the other side of the bridge if he pleased. The plaintiff refused to do so, and remained where he was so obstructed about half an hour.

And if a partial restraint of the will be sufficient to constitute an imprisonment, such undoubtedly took place. He wished to go in a particular direction, and was prevented; but at the same time an-

other course was open to him. About the meaning of the word imprisonment, and the definitions of it usually given, there is so little doubt that any difference of opinion is scarcely possible. Certainly, so far as I am aware, none such exists upon the present occasion. The difficulty, whatever it be, arises when the general rule is applied to the facts of a particular case.

“Every confinement of the person” (according to Blackstone¹) “is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets,” which perhaps may seem to imply the application of force more than is really necessary to make an imprisonment. Lord Coke, in his second Institute,² speaks of “a prison in law” and “a prison in deed;” so that there may be a constructive as well as an actual imprisonment; and therefore it may be admitted that personal violence need not be used in order to amount to it. “If the bailiff” (as the case is put in Bull. N. P. 62) “who has a process against one, says to him, ‘You are my prisoner—I have a writ against you,’ upon which he submits, turns back or goes with him, though the bailiff never touched him yet it is an arrest, because he submitted to the process.” So if a person should direct a constable to take another in custody, and that person should be told by the constable to go with him, and the orders are obeyed, and they walk together in the direction pointed out by the constable, that is constructively an imprisonment though no actual violence be used.

In such cases, however, though little may be said, much is meant and perfectly understood. The party addressed in the manner above supposed feels that he has no option, no more power of going in any but the one direction prescribed to him than if the constable or bailiff had actually hold of him; no return or deviation from the course prescribed is open to him. And it is that *entire* restraint upon the will which, I apprehend, constitutes the imprisonment. In the passage cited from Buller’s *Nisi Prius* it is remarked that, if the party addressed by the bailiff, instead of complying, had run away, it could be no arrest unless the bailiff actually laid hold of him, and for obvious reasons. Suppose (and the supposition is perhaps objectionable as only putting the case before us over again) any person to erect an obstruction across a public passage in a town, and another, who had a right of passage, to be refused permission by the party obstructing, and after some delay to be compelled to return and take another and circuitous route to his place of destination; I do not think that, during such detention, such person was under imprisonment or could maintain an action for false imprisonment, whatever other remedy might be open to him.

I am desirous only to illustrate my meaning and explain the reason

¹ 3 Black. Com. 127.

² 2 Inst. 589.

why I consider the imprisonment in this case not to be complete. The reason shortly is, that I am aware of no case, nor of any definition, which warrants the supposition of a man being imprisoned during the time that an escape is open to him if he chooses to avail himself of it.

PATTERSON, J., gave a concurring opinion; LORD DENMAN, Ch. J., dissented.

Rule absolute.

WEST v. SMALLWOOD.

Court of Exchequer of England, Easter Term, 1838. 3 Mees. & W. 418.

TRESPASS for assault and false imprisonment. Plea, the general issue.

At the trial before Lord Abinger, C. B., at the Middlesex sittings after Hilary Term, it appeared that the plaintiff was a builder, and had been employed by the defendant to build some houses for him under a specific contract. Whilst the work was going on a dispute arose between the plaintiff and defendant, and the plaintiff in consequence discontinued the work, upon which the defendant went before a magistrate and laid an information against him, under the Master and Servant's Act, 4 Geo. 4, c. 34, § 3. The magistrate having granted a warrant, the defendant accompanied the constable who had the execution of it, and pointed out the plaintiff to him. Upon being brought before the magistrate, the complaint was heard and dismissed. Lord Abinger, C. B., was of opinion that the action was misconceived, and should have been in case; and thought that the evidence of interference in the arrest by the defendant was too slight to make him a trespasser; and the plaintiff's counsel not having pressed his lordship to lay that question before the jury, the plaintiff was nonsuited. Motion that the nonsuit be set aside and new trial granted.

LORD ABINGER, C. B. Where a magistrate has a general jurisdiction over the subject-matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case, if he has acted maliciously. The magistrate acting without any jurisdiction at all is liable as a trespasser in many cases, but this liability does not extend to the constable, who acts under a warrant, and the statute 24 Geo. 2, c. 44, was passed with this very object of protecting such officers. As to the other part of the case, I do not deny that the fact of the defendant's presence when the

plaintiff was taken, and his pointing him out to the constable, might make it a case to go to the jury, but that was not pressed on the part of the plaintiff.

BOLLAND, B. I am of the same opinion, and for the same reasons. With regard to the case of the sheriff, that is clearly distinguishable from the present, because the party puts the sheriff in motion, and the latter acts in obedience to him. In the case of an act done by a magistrate, the complainant does no more than lay before a court of competent jurisdiction the grounds on which he seeks redress, and the magistrate, erroneously thinking that he has authority, grants a warrant. As to the subsequent conduct of the defendant, all he does is to point the plaintiff out to the constable as the person named in the warrant; but this does not amount to any active interference. If any malice could be shown, it might have formed the ground of an action on the case.

ALDERSON, B. As to the first point, the party must be taken to have merely laid his case before the magistrate, who thereupon granted a warrant adapted to the complaint. Then, what has been done by the defendant to make him liable as a trespasser? He would be liable only in case, if he was actuated in what he did by malice. Then comes the second question; and I agree in the doctrine, that if the defendant took an active part with the constable in apprehending the plaintiff, he must have failed on the state of these pleadings, because it would have been incumbent on him to show that he had a right so to do, which he could only have done under a special plea, and could not do under the general issue. But all that the defendant did in this instance was to point out to the constable the party who was to be arrested. And though undoubtedly that was evidence for the jury, yet where counsel submits to the view taken of the evidence by the judge at nisi prius, and does not claim to have it left to the jury, I think we ought not to interfere.

Rule refused.

SAVACOOLO v. BOUGHTON.

Supreme Court of New York, July, 1830. 5 Wend. 170.

DEMURRER to replication. The plaintiff declared in trespass for an assault, battery, and false imprisonment. The defendant pleaded, 1. The general issue; 2. A justification, for that he as a constable, by virtue of an execution issued by a justice of the peace, on a judgment rendered against the plaintiff in assumpsit for \$7.38, arrested the plaintiff and committed him to jail; and, 3. A similar justification, setting forth the judgment. The plaintiff replied to the second and third pleas *precludi non*, because, previous to the rendition of the

judgment set forth by the defendant, the justice who rendered the same did not issue any process for the appearance of him (the plaintiff) in the suit in which the judgment was rendered, and that he (the plaintiff) did not direct or authorize the justice to enter a judgment by confession in favor of the plaintiffs in the suit, against him (the plaintiff in this cause), nor did the parties in the said suit appear before the justice and join issue, pursuant to the provisions of the \$50 Act; and this, &c., wherefore, &c. To this replication the defendant demurred, and the plaintiff joined in demurrer.

MARCY, J. What an officer is required to show to justify himself in the execution of process is not very clearly settled. There is considerable contrariety of authority on the subject. Where it appears on the face of the process that the court or magistrate that issued it had not jurisdiction of the subject-matter of the suit, or of the person of the party against whom it is directed, it is void, not only as respects the court or magistrate and the party at whose instance it is sued out, but it affords no protection to the officer who has acted under it.

Where the court issuing the process has general jurisdiction, and the process is regular on its face, the officer is not, though the party may be, affected by an irregularity in the proceedings. Where a judgment is vacated for an irregularity, the party is liable for the acts done under it; but the officer has a protection by reason of his regular writ. 1 Lev. 95; 1 Sid. 272; 1 Strange, 509.

More strictness has been required in justifying under process of courts of limited jurisdiction. Many cases may be found wherein it is stated generally that when an inferior court exceeds its jurisdiction, its proceedings are entirely void, and afford no protection to the court, the party, or the officer who has executed its process.

This proposition is undoubtedly true in its largest sense where the proceedings are *coram non judice*, and the process by which the officer seeks to make out his justification shows that the court had not jurisdiction; but I apprehend that it should be qualified where the subject-matter of the suit is within the jurisdiction of the court, and the alleged defect of jurisdiction arises from some other cause. A court may have jurisdiction of the subject-matter, but not of the person of the parties. If it does not acquire the latter, its proceedings derive no validity from the former. A justice of the peace who should give judgment against a person on a promissory note under \$50, without having issued process of any kind against him, or taken his confession, or without his voluntary appearance in court, would exceed his jurisdiction and be responsible to the party injured: so would the party who procured the court to exceed its authority. But would the officer to whom an execution on this judgment had been issued be liable for acts done in obedience to it, if nothing appeared to show that the justice had not jurisdiction of the defendant's person? This is the question presented by the demurrer in this case.

A distinction has long existed in cases of this kind, between the court which exceeds its jurisdiction and the party at whose instance it takes place, and a mere ministerial officer who executes the process issued without authority. This prevails, as we have seen, where a judgment has been obtained in a court of general jurisdiction which is subsequently set aside for irregularity. The officer has a protection that the party has not, and that, whether the court from which the process issues is a court of general or limited jurisdiction. The right of a mere ministerial officer to justify under his process where the court or party cannot, was considered, but not settled, in the case of *Smith v. Bouchier and Others*, decided in 1734. This case is found in 2 Strange, 993; 2 Barnard. 331; Cunn. 89, 127; Cases temp. Hardwicke, 62; 2 Kelyn. 144, pl. 123. The reports agree as to the facts, but not as to some points in the opinion of the court. Process was issued from the chancellor's court of Oxford against Smith, who was arrested and committed to jail. The proceedings were instituted without proving what was requisite to give the court jurisdiction. The plaintiff who procured the proceedings, the vice-chancellor who held the court, and the officers who executed the process, were all sued by the defendant Smith for false imprisonment. They united in their plea of justification, and were all pronounced guilty. Sir John Strange makes the court say that some of the defendants, namely, the officer and jailer, might have been excused if they had justified without the plaintiff and vice-chancellor. The Court of Common Pleas in England, in their opinion in the case of *Perkin v. Proctor and Green*, 2 Wilson, 382, say that Lord Hardwicke denied that such could have been the case. It appears from the case, as reported in Hardwicke's Cases, 69, that the point of the officer's liability was not settled; for it is there said that there was no need of giving a distinct opinion as to the action lying against them.

In *Hill v. Bateman*, 2 Strange, 710, the distinction in favor of the officer is clearly taken. The plaintiff had been fined under the game laws, and was immediately sent to bridewell, without any attempt to levy the penalty upon his goods. This the justice had not a right to do, and was held liable for the imprisonment; but the constable was justified, because the matter was within the jurisdiction of the justice. I understand by this case that the justice had not authority, or, in other words, had not jurisdiction, to issue process to commit the party until he had attempted to levy the fine upon his goods; but that after he had made that attempt without success, he had authority to commit him. The process, though unauthorized by the circumstances of the case, would, under other circumstances, have been proper. The issuing of the process was a matter within the justice's jurisdiction. This was enough for the officer's justification. It is further said in this case, if the justice makes a warrant which is plainly out of his jurisdiction, it is no justification. This I under-

stand to mean a warrant which appears on its face to be such as the justice could in no case issue.

The views I have of this case are confirmed by that of *Shergold v. Holloway*, 2 Strange, 1002. There the justice issued a warrant on a complaint for not paying wages, and the defendant, a constable, arrested Shergold on it. He was sued for this arrest. The court said the justice had no authority in any instance to proceed by warrant, a summons being the only process. The constable could not therefore justify; he was presumed to know that under no circumstances could a warrant be issued in such a case; therefore the court say there was "no pretence for such a justification." This decision would doubtless have been different if it had appeared that under any state of things a proceeding by warrant was allowable in such a case; for then the court would assume for the officer's protection that such a state of things did exist, or, at least, he should not be required to judge whether it did or not. His duty and his protection both depend upon the assumption that the justice had determined correctly, that those circumstances had happened which called for a warrant, if under any circumstances a warrant could issue. In the case of *Moravia v. Sloper*, Willes, 30, the same distinction which has been noticed in the cases before referred to is still more distinctly put forth. It is there said that "though in case of an officer who is obliged to obey the process of the court, and is punishable if he does not, it may not be necessary to set forth that the cause of action arose within the jurisdiction of the court; it has always been holden, except in one case (the correctness of which C. J. Willes controverted in another part of his opinion), and we are all clearly of opinion that it is necessary in the case of a plaintiff himself."

Lord Kenyon says, in the case of *The King v. Danser*, 6 T. R. 242, "A distinction indeed has been made with respect to the persons against whom an action may be brought for taking the defendant's goods in execution by virtue of the process of an inferior court, where the cause of action does not arise within its jurisdiction; the *plaintiff* in the cause being considered a trespasser, but not the *officer* of the court." A court of admiralty, I apprehend, will not be considered a court of general jurisdiction. In relation to its proceedings, Buller, J., says, in the case of *Ladbroke v. Crickett*, 2 T. R. 653, if upon their face "the court had jurisdiction, the officer was bound to execute the process, and could not examine into the foundation of them; and that will protect him."

There are several cases in our own Reports which are supposed to militate against the distinction recognized in the foregoing cases; I apprehend, however, that most of them may be reconciled with those decisions which support it. The decision in the case of *Borden v. Fitch*, 15 Johns. R. 121, was, that a court must not only have jurisdiction of the subject-matter, but of the person of the

parties, to render its proceedings valid; and if it has not jurisdiction of the person, its proceedings are absolutely void. It will be recollected that the person who wished to avail himself of the proceedings of the court whose jurisdiction was impeached, was a party to them. There was no occasion or opportunity afforded by that case of considering the question involved in this, the liability of the officer, who, as a minister of the court, has executed its process issued on such proceedings.

The case of *Cable v. Cooper*, 15 Johns. R. 152, deserves a more minute consideration. One Brown was committed an a ca. sa. to the custody of the defendant, who was sheriff of Oneida County, and discharged by a Supreme Court commissioner under the habeas corpus act. The defendant, when prosecuted for the escape of Brown, offered to justify by showing the discharge; but a majority of the court decided that the proceedings under the habeas corpus act before the commissioner were coram non iudice, and therefore void. The principle of this decision is, that the power to discharge under that act does not apply to the case of a prisoner who "*is convict or in execution by legal process.*" Brown was in execution by legal process, and this was well known to the defendant, for he had the ca. sa., and held the prisoner. Whatever appeared upon the face of the discharge, he knew, if he rightly understood the powers of the commissioner, it was no authority for him to release Brown. If the discharge did not relate to the imprisonment on the ca. sa., it was certainly no authority to release him from confinement thereon; and if it did relate to that imprisonment, then it showed on its face a want of jurisdiction in the officer who granted it; for he could not discharge a person in execution by legal process. Again, the sheriff who held the prisoner might well be regarded as a party to the proceeding before the commissioner for the discharge; for the habeas corpus must have been directed to him, and his return thereto showed the true cause of Brown's detention.

The cases of *Smith v. Shaw*, 12 Johns. R. 257, and *Suydam and Wyckoff v. Keys*, 13 Ib. 444, have a tendency to obliterate, or at least confound, the distinction which the other cases seem to me to raise in favor of the officer. I am free to confess that the reasoning and conclusion of the judge who delivered the dissenting opinion in the former case are more satisfactory to me than those contained in the opinion adopted by a majority of the court. Smith, in that case was not looked upon in the light of a mere ministerial officer. He was superior in authority to Hopkins and Findley, who had illegally imprisoned the plaintiff; and his liability was put expressly upon the ground that he had ratified and confirmed their acts, and exercised other restraint over the plaintiff than merely continuing the original imprisonment. If he had only refused to discharge the prisoner, he would not, as is strongly intimated by the court, have

been held liable. This case was not considered by the court as presenting the question which arises in the one now before us, and therefore it can afford but little authority to guide our present determination.

It seems to me somewhat difficult to reconcile the decision in the case of *Suydam and Wyckoff v. Keys*, with the doctrine I am endeavoring to establish, or with the principles of some other cases which have been decided here. The defendant was a collector of a tax which had been voted by a school district in Orange County, and assessed by the trustees. They had authority to assess, but were confined in their assessments to the *resident inhabitants* of the district. The plaintiffs, having property in the district, but actually resident in New York, were included among the persons assessed, and designated on the warrant issued to the defendant as *inhabitants of the district*. He took their property by virtue of this warrant, and was held liable in an action of trespass. It appears to me the defendant, acting merely as a ministerial officer, should have been allowed the protection of his warrant, which did not show upon the face of it an excess or want of jurisdiction in the trustees. I cannot distinguish this case from a whole class of cases, beginning with the earliest reports and coming down to this, holding that such a warrant is a protection to the officer executing it, unless it is to be distinguished from cases otherwise similar, by the fact that the want of jurisdiction in the trustees to make the assessment on the plaintiffs was to be presumed to be within the knowledge of the officer, and that he was bound to act on this knowledge, in opposition to the statements of his warrant. The decision, however, is not put on such ground, but upon the broad principle that the officer must see that he acts within the scope of the legal powers of those who commanded him. This principle requires a ministerial officer to look beyond his precept, and examine into extrinsic facts beyond the fact of jurisdiction of the subject-matter generally, or under certain circumstances. Such, I apprehend, was not the doctrine applied to the case of *Warner v. Shed*, 10 Johns. R. 138. There the officer was justified by his process, as that showed the justice's jurisdiction of the subject-matter. "He was not bound," the court says, "to examine into the validity of the proceedings and of the process." The collector's warrant in the former case, as well as the constable's mittimus in the latter, showed jurisdiction of the subject-matter in the officers issuing the process. In the former case it appeared upon the face of the process that the plaintiffs were resident inhabitants, and as such they were liable to be assessed; and I should think that the collector was no more bound to examine into the fact of residence which had been passed on by the trustees, than the constable was to look into the proceedings of the special sessions under whose authority he acted.

I find still greater difficulty in reconciling the case of *Suydam and*

Wyckoff *v.* Keys with that of *Beach v. Furman*, 9 Johns. R. 229. The court assume, though they do not directly decide, that Sarah Furman was not, by reason of being a female, liable to be assessed to work on the highways; yet they held that the justice who issued, at the instance of the overseer of the highways, the warrant on which her property was taken and sold for this illegal assessment, and the constable who executed it, both protected, because they acted ministerially and in obedience to the commissioners and overseer of highways, who had jurisdiction over the subject-matter, the assessment of highway labor. Let us compare this case with that of *Suydam and Wyckoff v. Keys*, and see if they can stand together. The commissioners had jurisdiction of the subject-matter, the assessment of labor. The trustees had jurisdiction of the subject-matter, the assessment of a district tax. The commissioners assessed a person who, by reason of her sex, was not liable to be assessed, as the court in giving their opinion conceded. The trustees assess persons who, by reason of their residence out of the district, were not liable to be assessed; the justice and constable who enforce the commissioners' assessment, by taking the property of the person illegally assessed, are protected; the constable who enforces the illegal assessment of the trustees, by taking the property of the persons illegally assessed, is held liable as a trespasser. I think these cases cannot well stand together, and if one must be given up, I do not hesitate to say it should be *Suydam and Wyckoff v. Keys*.

The remark of this court in the case of *Gold v. Bissell*, 1 Wendell, 213, "that where a warrant cannot legally issue without oath, but is so issued, all the parties concerned in the arrest under such process are trespassers," was not intended, I presume, to apply to an officer who had no knowledge, from the warrant or otherwise, that it had not been duly sued out. A remark somewhat similar is made by Trimble, J., in *Elliott v. Peirsol*, 1 Peters' U. S. Rep. 340; but the decision of that case did not call for any such distinction as is raised in the one now under consideration. I have felt that the case of *Wise v. Withers*, 3 Cranch, 331, is a direct authority against giving to the officer the protection that is now claimed for him. The plaintiff in that case was a magistrate in the District of Columbia, and, as such, not subject to do military duty. He was fined for neglect of such duty, and a warrant for the collection of the fine issued to the defendant, who seized his property thereon; for this act he was prosecuted. The only point much considered in that case was that which involved the question as to the plaintiff's exemption from military duty; but that which related to the defendant's protection under his warrant was only glanced at in the argument of counsel and in the decision by the court. The distinction contended for in this case was scarcely raised there, and the attention of the court does not appear to have been drawn to a single case in which it has

ever been noticed. The Chief Justice, in the opinion of the court, merely observes, that it is a principle that a decision of such a tribunal (a tribunal of limited jurisdiction), clearly *without* its jurisdiction, cannot protect the officer who executes it. I would, with deference, ask whether there is not an error in the application of the principle which the Chief Justice lays down to the case then before the court. He must mean, by a decision being clearly without the jurisdiction of the court, a sentence or judgment on a matter not within its cognizance. Was the subject-matter of that cause beyond the cognizance of a court-martial? It appears to me that it was not. The power and duty of the court was to punish and fine delinquents; consequently, it had jurisdiction over the subject-matter, but not over the person. There was nothing in the process which the ministerial officer executed to apprise him that the court had not jurisdiction of the *person*. It seems to me that it was not a case to which the principle laid down by the court was applicable; but it would have been such a case if there had been a want of jurisdiction over the subject-matter. I can scarcely consider, therefore, the determination of the Supreme Court of the United States in the case of *Wise v. Withers* a deliberate decision on the question now before us. If it was to be viewed in that light, we should be called upon, by the great learning and high character of that court, to hesitate long and examine carefully before we decided a point conflicting with such decision.

There is certainly high authority for the distinction which I am disposed to recognize in this case; and, in my judgment, the same principle which gives protection to a ministerial officer who executes the process of a court of *general* jurisdiction, should protect him when he executes the process of a court of *limited* jurisdiction, if the *subject-matter* of the suit is within that jurisdiction, and nothing appears on the face of the process to show that the *person* was not also within it.

The following propositions, I am disposed to believe, will be found to be well sustained by reason and authority:—

That where an inferior court has not jurisdiction of the subject-matter, or, having it, has not jurisdiction of the person of the defendants, all its proceedings are absolutely void; neither the members of the court nor the plaintiff (if he procured or assented to the proceedings) can derive any protection from them when prosecuted by a party aggrieved thereby.

If a mere ministerial officer executes any process, upon the face of which it appears that the court which issued it had not jurisdiction of the subject-matter, or of the person against whom it is directed, such process will afford him no protection for acts done under it.

If the subject-matter of a suit is within the jurisdiction of a court, but there is a want of jurisdiction as to the *person* or place, the officer who executes process issued in such suit is no trespasser, unless the

want of jurisdiction appears by such process. Bull. N. P. 83; Willes, 32, and the cases there cited by Lord Ch. J. Willes.

I am therefore of opinion that the execution issued by the justice to the defendant, it being on proceedings over the subject-matter of which he had jurisdiction, and the execution, not showing on its face that he had not jurisdiction of the plaintiff's person, was a protection to the defendant for the ministerial acts done by him in virtue of that process.

Judgment on demurrer for the defendant, with leave to the plaintiff to amend his replication on payment of costs.

WILMARTH *v.* BURT.

Supreme Court of Massachusetts, October, 1843. 7 Met. 257.

Two actions of trespass for assault, battery and false imprisonment. The defendant, a deputy sheriff, pleaded the general issue, and set forth, by way of defence, that the assault, &c., were committed by him in the execution of civil process, by arresting the defendants upon an execution duly issued against them from the Court of Common Pleas. At the trial, it was proved or admitted that, on the 9th of July, 1842, an execution, in the usual form, was issued against the plaintiffs jointly, as co-partners, upon a judgment in the Court of Common Pleas, recovered by E. W. Chaddock, on a contract made on the 2d of October, 1837; that this execution was returned unsatisfied, and that an alias, in the common form, was issued on the 18th of August, 1842, upon which the plaintiffs were arrested by the defendant, and committed to the jail in Taunton; that they immediately gave bond for the liberty of the jail limits, went at large, and never surrendered themselves.

It also appeared that the plaintiffs had taken the benefit of the insolvent law of this Commonwealth, and had obtained a discharge under it, in the usual form, dated March 6th, 1841, and that this discharge was exhibited to the defendant before he made the above-mentioned arrest and commitment. The defendant admitted that he had a bond of indemnity from the execution creditor, which he required before he would arrest the plaintiffs on the execution.

Upon these facts, the defendant's counsel requested the court to rule that the actions could not be maintained, because trespass will not lie against an officer for the execution of process regularly issued, wherein he is commanded to arrest the body of the party therein named as defendant; because the plaintiffs could and should have pleaded their discharge, during the pendency of the action against them, in which said Chaddock's judgment was recovered, and have

caused the form of the execution to be varied, pursuant to the Rev. Sts. c. 97, §§ 10, 11, so as not to run against their bodies; and because the remedy of the plaintiffs, if they were unlawfully arrested, was by an application to a court for a discharge, by habeas corpus or otherwise. The judge, before whom the trial was had, refused this request, and instructed the jury, for the purpose of the trials, that the plaintiffs were entitled to recover; and a verdict was returned, in each case, for the plaintiffs, subject to the opinion of the whole court.

SHAW, C. J. These two cases depend on the same principle, and the decision of one settles both. Each is an action of trespass *vi et armis* for an assault and false imprisonment, and the trespass relied upon was the arrest of the plaintiff, on an execution, by the defendant, who was a deputy sheriff. The plaintiffs seek to avoid this justification, by showing that they had obtained a certificate of discharge, under the insolvent law of Massachusetts, which discharge was obtained long after the date of the contract on which the judgment was recovered, and that they exhibited their discharge to the defendant at the time of the arrest.

It does not distinctly appear, from the facts stated, whether the judgment, on which the above mentioned execution issued, was rendered before or after the date of the plaintiffs' discharge; but as the discharge was granted in March, 1841, and the first execution mentioned is stated to have been issued in June, 1842, there is ground to presume that the judgment was rendered some time after the discharge. If such was the case, it would be very clear that the officer could take no notice of such a discharge; for two reasons: 1st. In the case supposed, the debtor, having his discharge before the rendition of judgment, had an opportunity to plead it by way of defence; and if he did not do so, it may be presumed that it was not valid. 2d. The judgment, being rendered after the discharge, might have been founded on a cause of action which accrued after the discharge; and the officer could not by possibility know that it was not so. If the decision depended on this question, it might be necessary to send the cause back, to have that fact more exactly ascertained. But we think the result must be the same, if the discharge was obtained after the rendition of the judgment.

The execution was in common form, authorizing and requiring the officer to take the property of the debtor, to satisfy the execution, and for want thereof, to arrest him. In making the arrest, therefore, he followed precisely the command of his precept. As a general rule, the officer is bound only to see that the process, which he is called upon to execute, is in due and regular form, and issues from a court having jurisdiction of the subject. In such case, he is justified in obeying his precept, and it is highly necessary to the due, prompt and energetic execution of the commands of the law, that he should be so. *Fitzpatrick v. Kelly*, cited 3 T. R. 740; *Cameron v. Lightfoot*, 2

W. Bl. 1190. "It is incomprehensible," says Lord Kenyon, in *Belt v. Broadbent*, 3 T. R. 185, "to say that a person shall be considered as a trespasser who acts under the process of the court." *Tarlton v. Fisher*, 2 Doug. 671, was trespass for assault and false imprisonment of a certificated bankrupt. Some doubt arose upon the express words of the statute, that such person "shall not be liable to be arrested." But it was held, that though the debtor might have a supersedeas to the execution, yet that till superseded, it was a justification; and even after supersedeas, though trespass would lie against the party, it would not lie against the sheriff. And this is stated to be the settled practice. The inconvenience would be very great, if the law were otherwise.

And we think the same principle is well established by the authorities in our own books. *Smith v. Bowker*, 1 Mass. 76; *Haskell v. Sumner*, 1 Pick. 459. In *Nichols v. Thomas*, 4 Mass. 232, on an execution against a corporation styled the President, Directors and Company of a Turnpike, the officer arrested and committed one of the proprietors. There, indeed, he was held liable, because the plaintiff was not named nor described in his precept; the corporate name not being the description or designation of any natural person whatever. But *Parsons, C. J.*, there affirms the general rule, and illustrates it by reference to an executor or administrator not liable to arrest. "If," says he, "an execution should illegally issue against the body of an executor or administrator, on a judgment against the estate of the deceased, the officer might be justified in arresting the body of the executor or administrator, as he did not mistake his precept, which issued from a court having jurisdiction." The same rule is recognized in *Sanford v. Nichols*, 13 Mass. 288, where *Parker, C. J.*, says, "it will not do to require of executive officers, before they shall be held to obey precepts directed to them, that they shall have evidence of the regularity of the proceedings of the tribunal which commands the duty. Such a principle would put a stop to the execution of legal process."

If the plaintiff in such case has any remedy, it is not against the officer, who has simply executed the regular precept of a court having jurisdiction, but by applying for his discharge out of custody, or by *audita querela*, or by an action on the case against the party who thus wrongfully armed the officer with power to arrest him, upon the ground of its being, on his part, a malicious arrest.

And the reason for adopting this valuable rule, in a case like the present, is very strong. It would paralyze the action of an officer, and often defeat the service of legal process, if he were bound to stop and try the genuineness and validity of a certificate of discharge under a bankrupt or insolvent law. The certificate may not be genuine or legally authenticated, and yet the officer can take no evidence, nor even put the debtor himself under oath to prove it.

But further; suppose it be genuine, it is not an absolute discharge, or discharge from all debts, but only a discharge sub modo. Under the United States bankrupt law of 1841, it was held by Mr. Justice Story, that though, by the true construction of that law, the certificate, in certain cases, is not a discharge from fiduciary debts, yet that the certificate should be issued in general and unlimited terms, leaving the bankrupt to avail himself of it, so far as the law has made it an effective discharge. *Matter of Tebbetts*, 5 Law Reporter, 259.

So under our own insolvent law of 1838, c. 163, § 10, modified by subsequent acts, it is provided that if the insolvent shall have concealed his property, given preferences, or done other acts in fraud of the law, his discharge shall not be granted, or, *if granted, shall be of no effect*. Here then are cases, in which an insolvent or bankrupt may have his discharge in his pocket, and present it to the officer, in the amplest form of a full and complete discharge from all his debts, and yet, by operation of the law under which it is granted, it may be no discharge of the debt sought to be enforced by service of the execution. Is the officer to try all the questions of law and fact, involved in the question of the genuineness, the validity, and the application of the discharge to this particular debt? To hold that an officer would be liable in trespass, for executing the command of his precept, would be to hold that an executive officer must try all these questions, without power to summon a witness or hear the parties, and to decide the case correctly, upon peril of being liable for damages for false imprisonment.

The fact that the officer took an indemnity, can make no difference; it was to avail him only in case he had mistaken in regard to his duty. But whether he had an indemnity or not, is of no importance to the plaintiff; it did not convert into a wrong an act which was itself right and justifiable.

Verdicts set aside, and plaintiffs nonsuit.

EVERETT v. HENDERSON.

Supreme Court of Massachusetts, January, 1888. 146 Mass. 89.

CONTRACT on a poor debtor's recognizance, entered into by the first-named defendant as principal, and by the other defendant as surety, and containing the usual conditions.

At the trial in the Superior Court, before Mason, J., it appeared that the plaintiff duly recovered judgment against Henderson in the Municipal Court of the City of Boston, on May 29, 1884, and that execution duly issued on the judgment, but was returned in no part satisfied, and without service. On September 3, 1884, an alias exe-

ution on the judgment duly issued, and on September 8, 1884, the plaintiff made an affidavit, in due form of law, before Edward J. Jones, a master in chancery, that he believed, and had good reasons to believe, that Henderson "has property not exempt from being taken on execution, which he does not intend to apply to the payment" of the claim; and that Henderson "contracted the debt with an intention not to pay the same." Thereupon Jones, upon an ex parte hearing, granted a certificate "that, after due hearing, I am satisfied there is reasonable cause to believe that the charge made in the said affidavit is true; and satisfactory cause having been shown, I hereby authorize the arrest of the said debtor on the annexed execution;" and annexed the affidavit and certificate to the alias execution.

On November 1, 1884, Henderson was arrested in Boston by an officer duly qualified to make the arrest and serve the execution, and carried before Edward J. Jenkins, a commissioner of insolvency, before whom he gave the recognizance.

On November 24, 1884, Henderson duly gave notice of his intention to take the oath for the relief of poor debtors, before Henry W. Bragg, a master in chancery, and several hearings were had. On March 7, 1885, pending the examination, the plaintiff duly filed before Bragg charges of fraud, among which was the one sworn to in the affidavit, and hearings were had on such charges. The hearings on the charges of fraud were continued from time to time, and finally to April 18, 1885, at one P. M., at which time the plaintiff and Henderson appeared and remained during the whole hour, and after the lapse of the hour the plaintiff, before the appearance of the magistrate, departed. The magistrate, Bragg, was not in attendance within the hour, and did not appear and attend until a quarter past two o'clock, nor did any other magistrate attend in his place, and there were no further adjournments or proceedings had.

The defendants contended that the affidavit was made by the plaintiff falsely, fraudulently, and without probable cause, and that the plaintiff did not, at the time he made it, believe or have good reason to believe the affidavit to be true. The plaintiff, before any evidence was offered by the defendants, asked the judge to rule that no evidence could be offered or introduced in this action to control or affect the affidavit, or to show that the affidavit was false, fraudulent, or made without probable cause, or that the plaintiff did not believe, or had no good reason to believe, that the affidavit was true; but the judge refused so to rule, and admitted evidence to show that the affidavit was false and fraudulent, and made without probable cause, and that the plaintiff did not believe, and had no good reason to believe, the affidavit to be true at the time of making.

The judge instructed the jury, that the burden of proof was upon the defendants to establish the defence of fraud, and it must be

proved affirmatively; that it was not sufficient to show that Henderson intended to pay the debt when he contracted it, nor that the plaintiff when he made the affidavit had no good reason to believe that Henderson did not intend to pay the debt when he contracted it; that, while it was necessary for the defendants to prove both these propositions, they must go further, and prove that the plaintiff did not believe the affidavit when he made it, and that it was in fact a corrupt affidavit; that if the defendants proved all this, and that the magistrate's certificate authorizing the arrest was obtained by the fraud and perjury of the plaintiff, the plaintiff could not avail himself of the arrest thus obtained as the foundation of his cause of action, but as between the plaintiff and these defendants the arrest and recognizance would be void, and their verdict should be for the defendants; but that if the defendants had not sustained the burden of proof, and established wilful fraud and perjury on the part of the plaintiff, their verdict should be for the plaintiff in the penal sum named in the recognizance.

The jury found for the defendants; and the plaintiff alleged exceptions.

KNOWLTON, J. The defendants contend that the recognizance declared on cannot be enforced, because the proceedings in which it was taken were founded upon a wilfully false affidavit of the plaintiff. The act imputed to the plaintiff involves such moral turpitude that we cannot permit him even temporarily to profit by it, unless upon principle as well as authority our duty is clear.

The wrong complained of, so far as it affects the question before us, was like an ordinary malicious prosecution of a groundless suit. The proceedings for the arrest of the defendant Henderson were in the nature of a new prosecution. They were for the purpose of obtaining a remedy which was not available without them. The statute provides that they "shall be considered in the nature of a suit at law." Pub. Sts. c. 162, § 49. They were founded upon allegations of fact, heard at first *ex parte*, which, if issue was taken upon the arrest, were afterward to be regularly tried between the parties, with a view to an adjudication which should give or withhold the remedy sought. It is admitted that the affidavit was proper in form and substance, that the magistrate had jurisdiction to act upon it, and that he judicially found the facts alleged in it to be true, and signed a certificate authorizing the arrest. The arrest was regularly made by a proper officer, and the defendant Henderson was taken before a magistrate, and there entered into the recognizance in suit. The proceedings being conceded to have been in all other respects legal and proper, it is contended that the known falsity of the plaintiff's allegations in his affidavit rendered the arrest, as to him, illegal, and the recognizance void.

It is familiar law that an officer called upon to serve a process

needs only to see that it is good upon its face, and it is not suggested that the conduct of the officer or of the magistrate in relation to this arrest can be called in question. But there are cases in which an officer is protected in making an arrest, when the person who caused it or set the proceedings in motion is liable. If the arrest in this case was legal as to the plaintiff as well as the officer, the recognizance founded upon it was legal also, and can be enforced in this action. If it was illegal as to the plaintiff, he can be sued in trespass for causing it, the process as to him is no justification, and the recognizance is tainted with illegality and is void. We are brought, therefore, to the inquiry, Under what circumstances is an arrest under process illegal, as to the party causing it to be made?

There is no doubt that one who obtains a process and causes it to be served assumes the duty of seeing that it is well founded. He should know that it rests upon a good record, or other proper preliminary proceeding; but so far as the matter depends upon an adjudication by a court or magistrate having jurisdiction, he may rely upon that. Processes good on their face may be absolutely void for want of jurisdiction in the court or magistrate that issues them, or they may be voidable for error, or they may be voidable for irregularity in obtaining them. Processes voidable for error do not subject the person who directs their use to any liability, even after they are set aside. But processes irregularly obtained may be set aside, and then, as against those who obtained them, acts done under them are deemed to have been done illegally. *Cassier v. Fales*, 139 Mass. 461; *McGregor v. Crane*, 98 Mass. 530; *Barker v. Braham*, 3 Wils. 368; *Tarlton v. Fisher*, 2 Doug. 672; *Belt v. Broadbent*, 3 T. R. 183; *Bates v. Pilling*, 6 B. & C. 38; *West v. Smallwood*, 3 M. & W. 418; *Collett v. Foster*, 2 H. & N. 356, 361; *Chapman v. Dyett*, 11 Wend. 31; *Deyo v. Van Valkenburgh*, 5 Hill (N. Y.), 242; *Lovier v. Gilpin*, 6 Dana, 321.

In cases of error, the judicial action in which the error is found is a justification for all who have acted in reliance upon it. In *Marks v. Townsend*, 97 N. Y. 590, where a process for arrest was set aside for error, it was held that the person who obtained it was not liable, and it was said in the opinion, that if he had known facts which made the arrest improper, and, concealing them, had maliciously made the affidavit and caused the arrest, he would not have been liable for false imprisonment, but only for malicious prosecution. The affidavit seems to have been of matters other than those to be tried in the proceeding then instituted, and against this dictum there are conflicting dicta in other cases. Some judges have intimated that action like that supposed would constitute irregularity, for which the process might be set aside even if there was error also, and that the affiant would then be liable in trespass for false imprisonment. *Williams v. Smith*, 14 C. B. (N. S.) 596; *Smith v. Sydney*, L. R. 5 Q. B. 203; *Daniels v. Fielding*, 16 M. & W. 200.

The cases of irregularity cover a variety of defects in the record, or in other preliminary proceedings. Irregularities do not result from wrong adjudications, and in that respect they differ from errors. But irregularities, whether we include in the term those fundamental defects which go to the jurisdiction and render the process void, or limit it by a stricter definition which will comprise only those upon which the proceedings may be set aside, do not include false allegations of fact, made as a foundation for a suit in which the allegations are to be proved or disproved. And this is equally true whether they are falsely made by mistake or by design.

The remedy for causing an arrest by maliciously bringing a suit upon false charges, or maliciously making a false affidavit, is by an action on the case for a malicious prosecution. *Legallee v. Blaisdell*, 134 Mass. 473; *Luce v. Dexter*, 135 Mass. 23; *Baron v. Sleigh*, 2 Cro. Eliz. 628; *Daniels v. Fielding*, 16 M. & W. 200, 207; *De Medina v. Grove*, 10 Q. B. 152, 170; *Sheldon v. Carpenter*, 4 N. Y. 578. These authorities imply the negative, that an action of trespass for the arrest or for false imprisonment will not lie. And this point has been directly adjudicated. *Coupal v. Ward*, 106 Mass. 289; *Mullen v. Brown*, 138 Mass. 114; *Langford v. Boston & Albany Railroad*, 144 Mass. 431; *Wood v. Graves*, 144 Mass. 365; *Daniels v. Fielding*, 16 M. & W. 200; *Barber v. Rollinson*, 1 C. & M. 330. In each of the first three of the latter cases the arrest was upon a criminal prosecution, and the complainant did not cause it in the same sense as one causes an arrest who sues out a *capias* for his own purposes, and gives it to an officer with directions to serve it. One who makes a criminal complaint does not commonly direct the service of the precept, but from the beginning the control of the prosecution is with the officers of the law. In *Wood v. Graves*, *ubi supra*, in which the arrest was under a criminal warrant, it was held that the defendants were not liable for false imprisonment on account of abusing the process by procuring it to be issued for an improper purpose, and that the only abuse which would render them liable was an improper use of it after it had been served. In *Cassier v. Fales*, 139 Mass. 461, it is said that "it is difficult to see how any person can be guilty of a trespass in serving or causing to be served a valid writ, or other process of a court." *Lovier v. Gilpin*, 6 Dana, 321, 328, was an action of trespass against the plaintiff in a civil suit, for causing an attachment of property and assisting the officer in making it. There was an offer to show that the process was maliciously obtained, and in an elaborate opinion, reviewing the cases and holding that the action could not be maintained, Marshall, J., said: "We have found no case in which a party who institutes a groundless proceeding has been held liable as a trespasser for what is done by his direction, or with his aid, in the regular course of that proceeding, unless the process under which the act complained of was done be void, or unless, if

voidable only, the process itself, or the proceeding on which it rests, has been set aside or annulled before the action of trespass is brought."

The doctrine that the validity of proceedings in a suit at law cannot be called in question on the ground that it is not well founded in fact, rests upon important considerations of public policy. Every suit involves allegations of fact upon which a claim is founded. If the claim is resisted, the truth or falsity of the allegations is to be ascertained by a trial in the suit itself. The bringing of the suit is an offer on the part of the plaintiff to prove them. All action in the case proceeds upon the theory that the plaintiff is ready to maintain his claim, and that he may or may not succeed in establishing it. Every step in the suit is incidental to the purpose for which it is presumed to have been brought, — that of determining whether its allegations are true, and of obtaining a remedy if they are proved. Provisions are made for preserving the rights of both parties. They all recognize that the existence of a just cause of action is in dispute, and is to be regularly inquired into and finally passed upon in the suit itself. Whatever the law prescribes in the course of the proceeding, whether for the security of the plaintiff by way of attachment or arrest, or for the protection of any other interests of either party, may be legally done, and an ultimate decision that the plaintiff was mistaken or wilfully false in the original statement of his cause of action should not render it invalid. And this because there must be incidental acts, oftentimes of great importance and variety, in the litigation of a disputed question; and it is necessary that rights dependent upon these acts should be fixed and stable. Neither the plaintiff, nor any one else connected with the suit, should be called upon by the defendant to try collaterally the questions involved in it.

If, while the suit is pending, it should be attempted to separate the question of the merits of the action from that of the plaintiff's belief in regard to the merits of it, it would be practically impossible to do it. The rule is familiar, that an action for malicious prosecution cannot be maintained until the original suit has first been determined in favor of the original defendant. So long as anything remains open for trial upon the plaintiff's allegations in that, it will be deemed to have been properly brought. When it has been decided in favor of the defendant, he may show, if he can, that it was brought maliciously and without probable cause, and recover damages for the wrong done him.

There is no want of jurisdiction, irregularity, or error to affect any of the proceedings in a suit brought in due form, on a maliciously false statement of a claim. The only questionable element in it relates to that which must be uncertain in every case, the validity of the plaintiff's claim, and his belief in regard to it. When the uncertainty as to which of the parties is right is eliminated at

the trial by a verdict for the defendant, or the case is otherwise ended in his favor, and an action for malicious prosecution is brought, the former proceedings cannot be set aside, and are not rendered invalid.

In an action for malicious prosecution damages may be recovered for all the injury which resulted directly from bringing the suit, and from the measures regularly adopted in conducting it. It would be an anomaly if one could recover in such an action, and recover also in trespass from the same defendant for an arrest regularly made as a part of the same prosecution; or if an attachment of property, or any other incidental act from which damage resulted, could be made a separate cause of action, on the ground that it was illegal as against the original plaintiff who caused it;—much more if, before the termination of the original suit, one who as receptor had contracted with an officer to return attached property on demand could answer the officer's suit for the goods by alleging that the attachment was illegal as against the original plaintiff because the suit was maliciously brought; or if the officer himself could make a similar answer to a suit by the plaintiff for negligence in the performance of his duty in relation to an attachment.

If in the case at bar the arrest was not illegal as against the plaintiff, there was no defect in the recognizance. It was for a good consideration, and was entered into in due form, in accordance with the statute, before a magistrate having jurisdiction. Moreover, under our law it became the only security of the plaintiff, and stood in place of the judgment and execution. *Brown v. Kendall*, 8 Allen, 209, 210; *Morgan v. Curley*, 142 Mass. 107. It was perfect unless tainted with illegality. But the same considerations that show the arrest to have been regular and legal apply to this also. Indeed, this having been entered into voluntarily by the defendants, the only illegality to affect it must be sought for in the arrest which preceded it.

And it cannot be truly said that the reasoning applicable to arrests or attachments upon ordinary suits maliciously brought is inapplicable to this arrest upon execution. For the affidavit was a statement of matters which if true entitled the plaintiff to prosecute and maintain his suit in this way. The charge of fraud was the foundation of the new proceeding. It was a charge upon which the defendant could plead not guilty, and demand a trial, which would determine the ultimate rights of the parties. That trial could be had quickly, and the statute contemplated that both parties should proceed regularly in the mode prescribed, to ascertain the truth or falsity of the facts alleged, as they are required to do in any suit at law. The fact that an issue in relation to the pecuniary condition of the defendant was also triable is immaterial. Every reason why arrests and attachments made in suits upon maliciously

false declarations should be held legal, can be urged in support of the legality of the arrest in this case.

This case does not fall within the principle of numerous cases in which it is held that one shall not be permitted to take advantage of his own wrong. It is true that an arrest which is accomplished by means of an unlawful act, like breaking a dwelling-house, is void. But in these cases there is illegal action which precedes or accompanies the use of process, and is outside of it, and which leads directly to the arrest, and enters as an element into it. In the case at bar the arrest was not directly caused by an unlawful act. The plaintiff had no connection with it except through the process which he ordered served according to its precept. He made a statement under oath, which showed a proper case for an arrest, and a trial in the manner prescribed by law. The magistrate in a preliminary hearing acted judicially upon it, and gave his certificate of authority. Making a statement in such a case is in itself a lawful act; and a process regularly issued upon it, under which the statement may be further passed upon, is a lawful process. Illegality and fraud taint the statement, but not the process. That is good in law, whether the statement be true or false.

So where unlawful acts have been done in obtaining an attachment of property, like taking possession of it on Sunday, or fraudulently inducing the owner to bring it from a State where it cannot be attached to one where it can, there has been an element of wrong other than in the cause of action upon which the writ was procured. *Parsons v. Dickinson*, 11 Pick. 352; *Illesley v. Nichols*, 12 Pick. 270; *Deyo v. Jennison*, 10 Allen, 410. In each of the cases cited there was fraud or misconduct in regard to the property before it was taken under the writ, which made it unlawful for the plaintiff to attach it. The writ of replevin referred to in *Pine v. Morrison*, 121 Mass. 296, was not between the parties to that suit, and did not present for trial the issue presented in that. In *Crocker v. Atwood*, 144 Mass. 588, the fraud was not solely in stating a fictitious claim. The attachment of a particular article of personal property does not ordinarily follow from merely suing out a writ of attachment. Besides obtaining the writ, the plaintiff, in the original case to which *Crocker v. Atwood* relates, "caused the property to be taken on the attachment," and this he did with a fraudulent purpose to deprive the defendant of his rights in it. The case merely holds that other fraud may be taken advantage of, notwithstanding that there was a malicious prosecution.

A distinction has sometimes been suggested between illegality as a ground for a suit, and illegality which can be availed of in defence against the claim of another. But no such distinction exists in cases like that at bar. If the arrest was illegal as against the plaintiff, it was so as well for the purpose of sustaining a suit against

him for his wrong as for defeating an action brought upon the recognizance. In *Ammidon v. Smith*, 1 Wheat. 447, it was held that the fraudulent taking of an oath by a person under arrest on a civil process, and the obtaining of a release thereby, did not constitute an escape, nor charge the sureties in a suit upon his bond for the prison limits, even though they participated in the fraud. That too was a case in which the oath taken was not the foundation of proceedings for the purpose of trying the allegations contained therein. See also *Smith v. Quinton*, 2 Bray. (Vt.) 200.

If the validity of legal proceedings could be tried collaterally before the termination of the suit, on the ground that a false cause of action was maliciously stated, or that a false affidavit for arrest was maliciously made, a defendant whose property had been taken might sue for an injunction against the attaching officer. A defendant arrested, instead of trying the facts charged in the affidavit, in the manner prescribed by law, might apply for release upon habeas corpus, or, after a trial upon the charges before a magistrate, and at any time before final judgment in the Superior Court, if he saw he was likely to be convicted, he might make default, and set up, as the defendants have done in this case, the falsity of the affidavit in defence to the supplemental suit upon the recognizance. With such a rule there could be no regularity in procedure, and no certainty as to the value of any security.

In a case of this kind there is no hardship in leaving a party to existing remedies. He may, first, obtain under the statute an early hearing of the matters alleged against him, and secondly, after the case is ended, he may, if the facts will warrant it, bring his action for a malicious prosecution.

If this remedy is not now available to the defendant, it is because of neglect or misfortune for which he is legally responsible. It was his duty to have a magistrate present to hear or continue the cause at the time to which the hearing was adjourned. His neglect of that duty was a breach of his recognizance. Whether, with such a termination of the proceeding, he can now bring a suit for malicious arrest or prosecution is a question which is not before us. In *Fortman v. Rottier*, 8 Ohio St. 548, it was held by a majority of the court, that an action for malicious prosecution could be maintained for procuring an attachment upon a false affidavit, without first getting the proceeding set aside. And in *Bump v. Betts*, 19 Wend. 421, a similar decision was made, where property was attached and a judgment in rem obtained upon a false and malicious affidavit that the defendant had absconded. But in both of these cases it seems that the affidavits were not of matters which were to be tried in the regular course of proceedings instituted by them, and in that respect they differed from that in the case at bar.

Inasmuch as the jury were permitted to find for the defendants

upon a defence which was not properly open to them, the entry must be
Exceptions sustained.

HOGG v. WARD.

Court of Exchequer of England, Trinity Term, 1858. 3 Hurls. & N. 417.

TRESPASS for false imprisonment. Plea, not guilty (by statutes 7 Jac. 1, c. 5, § 1; 21 Jac. 1, c. 12, § 5; 19 & 20 Vict. c. 69, § 1; 2 & 3 Vict. c. 93, § 8; 1 & 2 Wm. 4, c. 42, § 19).

At the trial before Martin, B., at the Spring Assizes for the county of York, it appeared that on the 9th of June, 1857, the plaintiff, a butcher residing at South Cave, was arrested by the defendant, the superintendent of police for the district, for having in his possession some traces alleged to have been stolen from one Johnson, who was a person in the habit of attending fairs as an itinerant showman. The traces were on the horse in the plaintiff's cart, which was being driven by his servant at Cave fair. Johnson stopped the cart and said to the defendant, "These are my traces which were stolen at the peace rejoicing in 1856." The defendant sent for the plaintiff, who at once attended. The defendant asked the plaintiff how he accounted for the possession of the traces. The plaintiff stated that he had seen a stranger pick them up in the road, and that he had bought them of him for a shilling. The defendant then handcuffed the plaintiff and detained him in custody till the next morning, when he was taken before a magistrate, who immediately discharged him. According to the evidence of the plaintiff and another witness, Johnson was not present when the defendant took the plaintiff into custody, but the defendant, who was called as witness on his own behalf, stated that Johnson said to him, when the plaintiff arrived, "These are my traces, and I insist upon your taking him into custody." The defendant resided about three miles from South Cave, and had known the plaintiff for many years.

At the conclusion of the evidence, the counsel for the defendant submitted to the learned judge that, upon the facts admitted by the plaintiff to be true, the defendant was entitled to have the verdict entered for him. The learned judge intimated that he rather thought there was a question for the jury; and the result was that it was agreed that the opinion of the jury should be taken upon the amount of damages, and the question reserved for the court both upon the law and the fact. Rule obtained to show cause why the verdict should not be entered for the defendant pursuant to the leave reserved.

POLLOCK, C. B. We are all of opinion that the rule must be discharged. I abstain from expressing any opinion, except what is necessary for disposing of this particular case. The general law

and authorities have established that, in order to justify an arrest, there must be a reasonable charge. Whether that is to be decided by the judge as a matter of law, or by the jury as a matter of fact, is not important on the present occasion, because it was expressly reserved for the court to decide. It appears to me in this case there was not a reasonable charge, and that the verdict for the plaintiff ought to stand.

MARTIN, B. I am of the same opinion. The law is correctly laid down in Burn's Justice, vol. 1, p. 273 (29th ed.), where it is said that a constable may "apprehend a supposed offender for a felony without warrant upon a reasonable charge made by a third party, and this although, upon investigating the charge, it turn out that no felony has been committed. But there must in all cases exist a reasonable charge and suspicion." Therefore the constable is bound to ascertain whether the charge is reasonable. I am of opinion that the charge in this case was not reasonable. The traces, which were on the plaintiff's horse, were alleged to have been stolen. The plaintiff was not present at the time the charge was first made, but, on being sent for, he came and gave an account of how he came possessed of the traces; but, in defiance of that, the defendant arrested and imprisoned him. Looking at all the circumstances, I cannot think that the charge was reasonable, or that there was any real suspicion that the plaintiff had stolen the traces.

BRAMWELL, B. I am of the same opinion. The law is correctly laid down in Burn's Justice. It is not every idle and unreasonable charge which will justify an arrest, but there must be a charge not unreasonable. The Metropolitan Police Act, 2 & 3 Vict. c. 47, § 64, authorizes "any constable belonging to the metropolitan police to take into custody, without warrant, all persons whom he shall have good cause to suspect of having committed or being about to commit any felony, misdemeanor, or breach of the peace." This does not say that any charge is enough, but by implication says only such a charge as gives the constable *good cause* to suspect the person charged. If a person comes to a constable and says of another simpliciter, "I charge this man with felony," that is a reasonable ground, and the constable ought to take the person charged into custody. But if from the circumstances it appears to be an unfounded charge, the constable is not only not bound to act upon it, but he is responsible for so doing. Here the question is, whether the charge was not unreasonable. In my opinion it was a charge most unreasonable. I agree with Mr. Thompson that the case must be treated as if it were a case of recent possession; but then the other circumstances must be looked at. The plaintiff used the traces in the most open manner; and, when asked, he told how he got possession of them, and, moreover, the person who claimed them was a person not unlikely to have lost them.

WATSON, B. I am of the same opinion. There is no doubt about the law on the subject. So far as my experience goes, it always has been laid down by the judges and in the text-books that a constable may arrest without warrant where there is a reasonable charge of felony. The question here is, whether there was a reasonable charge. I think there was not. The argument as to reasonable and probable cause has no application: the question is, whether a reasonable charge was made. Now, every case must be governed by its own circumstances, and the charge must be reasonable as regards the subject-matter and the person making it. If an idiot made a charge, the constable ought not to take the person so charged into custody. In *Isaacs v. Brand*, 2 Stark. N. P. 167, Lord Ellenborough said that the declaration of the thief did not justify a constable in taking a person into custody upon a charge of receiving the stolen goods. I have attentively considered whether the charge in this case was reasonable, because it is of the utmost importance that the police throughout the whole country should be supported in the execution of their duty, — indeed, it is absolutely essential for the prevention of crime; on the other hand, it is equally important that persons should not be arrested and brought before magistrates upon frivolous or untenable charges. Whether the question of reasonable charge is a matter of law for the judge, or a matter of fact for the jury, I do not express an opinion, as that was left to us, and I come to the conclusion that this was not a reasonable charge. It is not necessary to repeat the facts, but, taking them strongly in the defendant's favor, I think that this was not a reasonable charge, and that the defendant acted contrary to his duty and contrary to law in arresting the plaintiff.

Rule discharged.

ALLEN *v.* WRIGHT.

Common Pleas of England, *Nisi Prius*, Trinity Term, 1838. 8 Car. & P. 522.

THE declaration stated that the defendant, on the 19th of March, 1838, assaulted the plaintiff, and forced and compelled her to go into the public street, and through several lanes, &c., to the police station-house in Tower Street, Lambeth, and there imprisoned and kept her, without any reasonable or probable cause, for twenty hours, contrary to law and against her will; and that on the 20th of March he again assaulted her, and compelled her to go from the station-house to Union Hall Police Office, and there kept and detained her for six hours, whereby she was not only hurt and injured in her body and mind, but also exposed and injured in her credit and circumstances. The defendant pleaded, first, not guilty; and, secondly, a special plea, to the following effect: that the plaintiff was a

lodger in the defendant's house, and was supplied with a feather-bed, which, during a portion of the time, was made by the plaintiff and a servant of the defendant; that the plaintiff, while she was such lodger, demeaned herself in an improper, irregular, and disreputable manner, and particularly in receiving the visits of and cohabiting with one G. D., and that, after a certain time, she refused to allow the servant to assist in making the bed, and always locked the door of the room when she went out. It then averred that while the plaintiff continued as lodger, as aforesaid, seventy pounds weight of feathers were stolen from the bed; and that the defendant, having good and probable cause of suspicion, and vehemently suspecting the plaintiff to be the person who stole them, caused her to be apprehended, &c.

From the evidence on the part of the plaintiff, it appeared that she resided for some time in the house of the defendant with a gentleman named Davison, who passed with her by the name of Gordon. They left in the evening of Friday, the 16th of March, between six and seven o'clock; and, after they were gone, that same evening a friend of the gentleman paid the defendant for him several claims for damage to furniture, &c., and at that time nothing was said about any loss of feathers from the bed. On the evening of Monday, the 19th of March, about ten o'clock, the defendant and his wife were observed by a policeman on duty watching the house No. 12 in the Waterloo Road. The defendant addressed the policeman, and told him he wished to ascertain whether a young woman named Gordon was living there. The policeman inquired what he wanted her for, and was told of the damage sustained, which had been paid for, and also that there was a large quantity of feathers missing out of the bed. The policeman knocked at the door and gained admittance to the house, together with the defendant. The plaintiff inquired who wanted her, and on being told, said she could not see Mr. Wright that night. It was then about twenty minutes past ten. The policeman and Mr. Wright followed the servant upstairs. They saw the plaintiff, and the policeman asked the defendant if that was the person. He said yes, it was, and then charged her with stealing the feathers out of the bed in his house while he was lodging there. The policeman told her that she must go with him to the station-house. She at first objected, but afterwards went, and the defendant made his charge to the inspector, and she was locked up in a cell, where she remained till between ten and eleven the next morning. A duplicate for a bed was found upon her. After the plaintiff had been locked up, the policeman went back with the defendant's wife to the plaintiff's lodgings, but nothing belonging to the defendant was found there. The plaintiff was taken on the next day before Mr. Trail, at Union Hall, who discharged her. The defendant wished him to remand her, but he would not.

It was also proved that the gentleman with whom the plaintiff lived supplied her with adequate means of support; and a witness stated that he had examined the bed, and found it to be a very old one, and expressed it as his opinion that the quantity of feathers in it was sufficient for its size.

TINDAL, C. J., after stating the complaint in the declaration and the defendant's answer to it, said: That is an answer which it is incumbent on him to make out to your satisfaction, because he has taken the law into his own hands, by not acting as any prudent person would have done, viz., going before a magistrate and taking out a warrant. At all events, the defendant acted in a very indiscreet manner (as there was no reason to conclude that the plaintiff had any intention to abscond) in not taking the usual and cautious step of having the case investigated by a magistrate before imprisoning the party. The only two points upon which you must be satisfied before you can find a verdict for the defendant are, 1st, that a felony had actually been committed; that some person or other had stolen, according to the evidence, about half the feathers from the bed; and 2d, that the circumstances were such that you yourselves, or any reasonable person, acting without passion and prejudice, would have fairly suspected the plaintiff of being the person who did it. If you think the circumstances were such, you will find your verdict for the defendant; if you do not, you will find your verdict for the plaintiff, and give her such reasonable damages as you think she is entitled to.

Verdict for the plaintiff.

CHAPTER VIII.

ASSAULT AND BATTERY.

STEPHENS v. MYERS.

Common Pleas of England, Nisi Prius, Trinity Term, 1830. 4 Car. & P. 349.

ASSAULT. The declaration stated that the defendant threatened and attempted to assault the plaintiff. Plea, not guilty.

It appeared that the plaintiff was acting as chairman at a parish meeting, and sat at the head of a table, at which table the defendant also sat, there being six or seven persons between him and the plaintiff. The defendant, in the course of some angry discussion which took place, having been very vociferous, and having interrupted the proceedings of the meeting, a motion was made that he should be turned out, which was carried by a very large majority. Upon this the defendant said he would rather pull the chairman out of the chair than be turned out of the room, and immediately advanced with his fist clenched toward the chairman, but was stopped by the churchwarden, who sat next but one to the chairman, at a time when he was not near enough for any blow he might have meditated to reach the plaintiff; but the witnesses said that it seemed to them that he was advancing with an intention to strike the chairman.

TINDAL, C. J., in his summing up, said: It is not every threat, when there is no actual personal violence, that constitutes an assault; there must in all cases be the means of carrying the threat into effect. The question I shall leave to you will be, whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman, if he had not been stopped. Then, though he was not near enough at the time to have struck him, yet if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise, you must find it for the plaintiff, and give him such damages as you think the nature of the case requires.

Verdict for the plaintiff.

COLE *v.* TURNER.

King's Bench of England, Nisi Prius, Easter Term, 1705. 6 Mod. 149; s. c. Holt, 108.

HOLT, C. J., upon evidence in trespass for assault and battery, declared,

First, that the least touching of another in anger is a battery.

Secondly, if two or more meet in a narrow passage, and, without any violence or design of harm, the one touches the other gently, it will be no battery.

Thirdly, if any of them use violence against the other, to force his way in a rude, inordinate manner, it will be a battery; or any struggle about the passage to such degree as may do hurt will be a battery.

BROWN *v.* KENDALL.

Supreme Court of Massachusetts, October, 1850. 6 Cush. 292.

THIS was an action of trespass for assault and battery, originally commenced against George K. Kendall, the defendant, who died pending the suit, and his executrix was summoned in.

It appeared in evidence, on the trial, which was before Wells, C. J., in the Court of Common Pleas, that two dogs belonging to the plaintiff and the defendant, respectively, were fighting in the presence of their masters; that the defendant took a stick about four feet long, and commenced beating the dogs in order to separate them; that the plaintiff was looking on, at the distance of about a rod, and that he advanced a step or two towards the dogs. In their struggle, the dogs approached the place where the plaintiff was standing. The defendant retreated backwards from before the dogs, striking them as he retreated; and as he approached the plaintiff, with his back towards him, in raising his stick over his shoulder, in order to strike the dogs, he accidentally hit the plaintiff in the eye, inflicting upon him a severe injury.

Whether it was necessary or proper for the defendant to interfere in the fight between the dogs; whether the interference, if called for, was in a proper manner, and what degree of care was exercised by each party on the occasion, — were the subject of controversy between the parties, upon all the evidence in the case, of which the foregoing is an outline.

The defendant requested the judge to instruct the jury, that "if both the plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary

care and the plaintiff was not, or if at that time both plaintiff and defendant were not using ordinary care, then the plaintiff could not recover."

The defendant further requested the judge to instruct the jury, that, "under the circumstances, if the plaintiff was using ordinary care and the defendant was not, the plaintiff could not recover, and that the burden of proof on all these propositions was on the plaintiff."

The judge declined to give the instructions, as above requested, but left the case to the jury under the following instructions: "If the defendant, in beating the dogs, was doing a necessary act, or one which it was his duty under the circumstances of the case to do, and was doing it in a proper way; then he was not responsible in this action, provided he was using ordinary care at the time of the blow. If it was not a necessary act; if he was not in duty bound to attempt to part the dogs, but might with propriety interfere or not as he chose; the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word inevitable not in a strict but a popular sense."

"If, however, the plaintiff, when he met with the injury, was not in the exercise of ordinary care, he cannot recover, and this rule applies, whether the interference of the defendant in the fight of the dogs was necessary or not. If the jury believe, that it was the duty of the defendant to interfere, then the burden of proving negligence on the part of the defendant, and ordinary care on the part of the plaintiff, is on the plaintiff. If the jury believe, that the act of interference in the fight was unnecessary, then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of the plaintiff, is on defendant."

The jury under these instructions returned a verdict for the plaintiff; whereupon the defendant alleged exceptions.

SHAW, C. J. This is an action of trespass, *vi et armis*, brought by George Brown against George K. Kendall, for an assault and battery; and the original defendant having died pending the action, his executrix has been summoned in. The rule of the common law, by which this action would abate by the death of either party, is reversed in this commonwealth by statute, which provides that actions of trespass for assault and battery shall survive. Rev. Sts. c. 93, § 7.¹

The facts set forth in the bill of exceptions preclude the supposition, that the blow, inflicted by the hand of the defendant upon the person of the plaintiff, was intentional. The whole case proceeds on the assumption, that the damage sustained by the plaintiff, from the stick held by the defendant, was inadvertent and unintentional; and

¹ Rev. Laws, c. 171, § 1.

the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage was done is responsible for it. We use the term "unintentional" rather than involuntary, because in some of the cases it is stated, that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act.

It appears to us, that some of the confusion in the cases on this subject has grown out of the long-vexed question, under the rule of the common law, whether a party's remedy, where he has one, should be sought in an action of the case, or of trespass. This is very distinguishable from the question, whether in a given case, any action will lie. The result of these cases is, that if the damage complained of is the immediate effect of the act of the defendant, trespass *vi et armis* lies; if consequential only, and not immediate, case is the proper remedy. *Leame v. Bray*, 3 East, 593; *Hugget v. Montgomery*, 2 N. R. 446, Day's Ed. and notes.

In these discussions it is frequently stated by judges, that when one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question, whether trespass and not case will lie, assuming that the facts are such, that some action will lie. These dicta are no authority, we think, for holding, that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional, nor careless. In the principal case cited, *Leame v. Bray*, the damage arose from the act of the defendant, in driving on the wrong side of the road, in a dark night, which was clearly negligent if not unlawful. In the course of the argument of that case (p. 595), Lawrence, J., said: "There certainly are cases in the books, where, the injury being direct and immediate, trespass has been holden to lie, though the injury was not intentional." The term "injury" implies something more than damage; but, independently of that consideration, the proposition may be true, because, though the injury was unintentional, the act may have been unlawful or negligent, and the cases cited by him are perfectly consistent with that supposition. So the same learned judge in the same case says (p. 597), "No doubt trespass lies against one who drives a carriage against another, whether done wilfully or not." But he immediately adds, "Suppose one who is driving a carriage is negligently and heedlessly looking about him, without attending to the road when persons are passing, and thereby runs over a child and kills him, is it not manslaughter? and if so, it must be trespass; for every manslaughter includes trespass;" showing what he understood by a case not wilful.

We think, as the result of all the authorities, the rule is correctly

stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault*; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. 2 Greenl. Ev. §§ 85 to 92; Wakeman v. Robinson, 1 Bing. 213. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. Davis v. Saunders, 2 Chit. R. 639; Com. Dig. Battery, A (Day's Ed.) and notes; Vincent v. Stinehour, 7 Verm. 69. In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given; to this effect, that if both plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time, both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.

In using this term, ordinary care, it may be proper to state, that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man, who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use less circumspection and care, than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.

We are not aware of any circumstances in this case, requiring a distinction between acts which it was lawful and proper to do, and acts of legal duty. There are cases, undoubtedly, in which officers are bound to act under process, for the legality of which they are not responsible, and perhaps some others in which this distinction would be important. We can have no doubt that the act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in his eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. Or if the defendant was chargeable with some negligence, and if the plaintiff was also chargeable with negligence, we think the plaintiff cannot recover without showing that the dam-

age was caused wholly by the act of the defendant, and that the plaintiff's own negligence did not contribute as an efficient cause to produce it.

The court instructed the jury, that if it was not a necessary act, and the defendant was not in duty bound to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word not in a strict but a popular sense. This is to be taken in connection with the charge afterwards given, that if the jury believed, that the act of interference in the fight was unnecessary (that is, as before explained, not a duty incumbent on the defendant), then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of plaintiff, was on the defendant.

The court are of opinion that these directions were not conformable to law. If the act of hitting the plaintiff was unintentional on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it. 2 Greenl. Ev. § 85; *Powers v. Russell*, 13 Pick. 69, 76; *Tourtellot v. Rosebrook*, 11 Met. 460.

Perhaps the learned judge, by the use of the term extraordinary care, in the above charge, explained as it is by the context, may have intended nothing more than that increased degree of care and diligence, which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances, to guard against danger. If such was the meaning of this part of the charge, then it does not differ from our views, as above explained. But we are of opinion, that the other part of the charge, that the burden of proof was on the defendant, was incorrect. Those facts which are essential to enable the plaintiff to recover, he takes the burden of proving. The evidence may be offered by the plaintiff or by the defendant; the question of due care, or want of care, may be essentially connected with the main facts, and arise from the same proof; but the effect of the rule, as to the burden of proof, is this, that when the proof is all in, and before the jury, from whatever side it comes, and whether directly proved, or inferred from circumstances, if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover.

New trial ordered.

DREW *v.* COMSTOCK.

Supreme Court of Michigan, July, 1885. 57 Mich. 176.

THE case is stated in the opinion of the court.

CAMPBELL, J. Drew recovered \$633 damages against defendant for assault and battery. Defendant brings error. The circumstances, so far as they are not disputed, were these: Defendant became owner of property in Big Rapids, that had been mill property, lying west of the Grand Rapids & Indiana Railroad. This was once owned by one Moon, and while he so owned it a spur track had been taken from a side track, connected by switch with the main track, so as to lead from the mill to the side track and thence out upon the main road, and with no other means of egress. This spur had been so built that one of the rails was on Moon's land, and it was built to accommodate the mill, but was used more or less to back cars on. It was built in 1873. In the mean time it had become dilapidated and the ties had rotted, so that at the time of this difficulty it was unfit for use without repair.

Plaintiff bought the property in 1880, and in the spring of 1881 went on to build a mill, which he got ready for use in October, 1881. There was a siding of the Detroit & Lansing Railroad which connected with his mill premises, and over which he shipped lumber. The siding was so near the spur that cars upon the latter would interfere with those on the siding. Defendant had desired the Grand Rapids & Indiana Railroad to remove the spur from his land, and some preparation had been made to do so. On the evening of the 12th of October, 1881, plaintiff, who was section foreman of track repairing for the Grand Rapids & Indiana Railroad, spiked down the switch from the spur to the side track of that road, to prevent any use of it, and had some talk with defendant, and from that or other means understood that he did not desire the spur to be used or to remain on his land.

On the 13th of October, in the morning, plaintiff came with a gang of men, and proceeded to renew the spur track by taking out the old ties and putting in new and sound ones throughout. Defendant forbade his doing so, and he persisted. After coming twice and ordering plaintiff off, with his reasons for doing so, plaintiff still insisting that he would refit the track, defendant came a third time and pointed out his line and insisted it should not be trespassed on.

At this point the controversy begins. It is claimed by plaintiff that defendant pushed him off, and before he could entirely recover himself struck him over the forehead with a stick, and wounded him over the eye, so that he was struck down; and that this wound was a permanent injury of a serious character. Defendant claims that

the stick was a sawed-off broom-handle that he had picked up in his mill to use as a staff, as he had been lamed; and that he struck to ward off an apparent effort by plaintiff to strike him with an uplifted shovel, and did not aim to do him injury, but the stick glanced and hit him as it fell. The stick was described by plaintiff as a hard-wood stick about four feet long. It appears to have been used with only one hand. When it was used, defendant's left side was nearest plaintiff, who claims he turned round to face him. The blow fell on the further side of plaintiff's forehead, immediately over his left eye. It was evidently struck by the rough end of the stick, as the wound, as described by Dr. Hendryk, the physician who dressed it, was only a flesh wound, less than an inch in length, which bled very freely, but involved no injury to either bone or periosteum, which had no complications in healing, and which he did not regard as a permanent injury.

It appears from the record that the case became greatly magnified by some extraneous matters, and there was much in the course of the trial which the court evidently regarded as of doubtful propriety and let in with some hesitation. We shall however confine ourselves to such questions as arose upon the charge, as we can hardly believe that a new trial will be allowed to be affected by the exaggerations which seem to have made out of what no physician has deemed a very serious wound, a murderous injury.

The whole case, so far as the alleged assault is concerned, involved but a few questions. It is not disputed, and the court held, that the plaintiff was actually intruding and trespassing on defendant's ground, with a design of permanent occupancy. But the court also held that defendant had no right to use any degree of force to keep off the trespassers, if the railroad company, under whom plaintiff had to justify, claimed rights there. And the court held that there was evidence of such a bona fide claim, and further that if defendant had no right to push plaintiff in the first instance he was in fault in striking the blow and must pay compensatory damages. He also referred several times to the claim of damages of \$5000 in the declaration as the only absolute limit to the jury's discretion, and made a further statement in these words: "A verdict in this case must cover all time. Mr. Drew can never sue again for any damage, no matter if he was prostrated on his bed during his lifetime after this from the effects of it. One action is all that can be brought in that case." The earlier part of the charge practically compelled the jury to find some damages.

Some other portions of the charge are complained of, but as they mostly bear upon what is raised by these rulings, we need not consider them separately.

In opening the summing-up, after referring to the case as one of great importance because of the large claim of damages, the court

told the jury there was no dispute "as to the fact that an assault and battery was committed, and the time when it was committed, and the person by whom and upon whom the injury was committed." An assault was then defined as involving an attempt "with unlawful force" to inflict bodily injury, and a battery as an actual injury, which in this case was a real one. And in the same connection the jury were told, as they were afterwards told, that they had entire discretion as to damages within the sum claimed in the declaration.

When the jury were told that defendant had committed an assault and battery, and that every assault and battery was a use of unlawful force, they were practically told to find for the plaintiff, and give discretionary damages; and when they had their attention subsequently called to the fact that plaintiff could never sue again, although he might be prostrated on his bed during his whole lifetime, they were authorized to act on the theory that the injury might produce future and permanent mischief not yet developed, and might assess their damages on that possibility. All of this was erroneous. There was a dispute whether the blow was aimed at all against plaintiff's safety, or directly against his person. The whole body of the controversy bore upon its legality; and there was no testimony whatever which tended to show that all the effects of the wound were not already developed or the wound not entirely healed without danger of reopening.

If an assault is always unlawful, then it was not admitted by defendant that he had committed one. But the definition is incorrect. An assault may be entirely lawful, as either excusable or justifiable, and it involves every "attempt" or offer, with force and violence, to do corporal hurt to another. *Toml. Law Dict. "Assault."* The jury therefore were misled in the outset into an assumption which, from the peculiar amount of the verdict, does not seem to have been corrected. And while there are in subsequent instructions some explanations which bear in another direction, they were so qualified as to leave room to the end for the original impression.

Upon the question of the original trespass it appears by plaintiff's own showing that he knew defendant disputed the right of the company. He could not justify his own entry unless the company could do so, as he did not enter in his own right. We find nothing in the record which tends to show either that the company was in ignorance of the exact condition of the title or that it claimed any adverse holding. So far as there is any evidence at all, it bears in the other direction. It appears, without any contradictory evidence that we have discovered, that the only persons who had any right to act for the railroad proposed to respect defendant's claim. It would be unjust to the corporation to attribute to it a design which was unlawful, without proof that some responsible agent was engaged in it. Plaintiff, according to his own statement, communicated with no one but an

assistant roadmaster and a master of transportation, neither of whom can be presumed to have authority to represent the company in claiming disputed titles, and he also says that he proposed to go forward on his own responsibility without reference to their orders.

Under such circumstances it is difficult to see where there is any room for justification shown, or for holding him to be anything but a trespasser on his own responsibility. And it cannot be questioned that the entry of plaintiff and his gang of men to relay the track, if tortious at all, in spite of any opposition by defendant, was a very serious wrong¹ directly calculated to provoke violence.

There was nothing in the push asserted to have been given in the first place to amount to a wrongful assault on a trespasser, or to justify force on the part of the plaintiff. And if defendant used his stick to defend himself from what seemed to him to be an assault, there was no wrong in doing so. And if the act of plaintiff was such as appeared to involve serious bodily harm or peril to his life, we are not prepared to say that he would be deprived of his right of self-defence by even a technical unlawful assault which did no damage.

All these considerations were in the case, and upon any theory of the conduct of the parties the instructions went too far. Passing any other grounds of error as unnecessary to be dealt with, the judgment must for these be reversed with costs and a

New trial granted.

¹To enter "with a strong hand or a multitude of people," that is, to make forcible entry was made a criminal offence as long ago as 1381, and such it is generally in this country.

CHAPTER IX.

SEDUCTION AND ENTICEMENT.

MARTIN *v.* PAYNE.

Supreme Court of New York, October, 1812. 9 Johns. 387.

THIS was an action of trespass on the case for debauching and getting with child Lanah, the daughter and servant of the plaintiff, by which he lost her service, and was obliged to pay a large sum of money for the expenses of her lying-in, &c.

The cause was tried at the Washington Circuit, in June, 1811, before Mr. Justice Spencer. At the trial the daughter of the plaintiff was produced as a witness and proved the seduction and pregnancy, &c.; that at the time of the seduction, which was in the spring of the year 1810, she was nineteen years of age, and lived in the house of her uncle, with whom she had resided from the autumn of 1809. She worked for her uncle when she pleased, and was to receive from him, for her work, one shilling per day. She also worked for herself, and expended all her earnings in clothes and necessaries for herself, as she saw fit. There was no agreement for her continuance in her uncle's house for any particular time; but she went to reside with him on the terms above mentioned, with the consent of her father. The defendant paid his addresses to her while she was at her uncle's, and she expected to have married him, and had at that time no expectation of returning to her father's house to reside. During the period of her residence with her uncle she occasionally visited her father's house, remaining there a week at a time. Immediately after she was debauched she returned to her father, who supported her, and was at the expense of her lying-in, &c. It did not appear that the father had done any act dispensing with his daughter's service, other than consenting to her remaining with her aunt.

The defendant's counsel objected that the plaintiff was not entitled to recover; but the judge, without deciding the question, permitted the cause to go to the jury, who found a verdict for the plaintiff, subject to the opinion of the court, on the facts in the case as above stated.

SPENCER, J. The case of *Dean v. Peel*, 5 East, 49, is against the action. It was there held that the daughter being in the service of another, and having no *animus revertendi*, the relationship of master and servant did not exist. In the present case, the father had made

no contract hiring out his daughter, and the relation of master and servant did exist, from the legal control he had over her services; and although she had no intention of returning, that did not terminate the relation, because her volition could not affect his rights. That is the only case which has ever denied the right of the father to maintain an action for debauching his daughter whilst under age; and I consider it as a departure from all former decisions on this subject. It has frequently been decided that where the daughter was more than twenty-one years of age there must exist some kind of service; but the slightest acts have been held to constitute the relation of master and servant in such a case. In *Bennett v. Allcott*, 2 Term Rep. 166, the daughter was thirty years of age; and Buller, Justice, held that even milking cows was sufficient. But where the daughter was over twenty-one, and in the service of another, as in *Postlethwaite v. Parkes*, 3 Burr. 1878, the action is not maintainable. In *Johnson v. M'Adam*, cited by Topping in *Dean v. Peel*, Wilson, J., said that where the daughter was under age he believed the action was maintainable, though she was not part of the father's family when she was seduced; but when she was of age, and no part of the father's family, he thought the action not maintainable. In *Fores v. Wilson*, Peake N. P. Cas. 55, which was an action for assaulting the maid of the plaintiff, and debauching her, per quod, &c., Lord Kenyon held that there must subsist some relation of master and servant; yet a very slight relation was sufficient, as it had been determined that when daughters of the highest and most opulent families have been seduced, the parent may maintain an action on the supposed relation of master and servant, though every one must know that such a child cannot be treated as a menial servant.

Put the case of a gentleman's daughter at a boarding-school debauched and gotten with child: on what principle can the father maintain the action, but on the supposed relation of master and servant arising from the power possessed by the father to require menial services? for in such a case there is no actual existing service constituting the relation of master and servant. Would it not be monstrous to contend that, for such an injury, the law afforded no redress? The case is perfectly analogous to the one before us: here the father merely permitted his daughter to remain with her aunt; he had not divested himself of his power to reclaim her services, nor of his liability to maintain and provide for her. She was his servant de jure, though not de facto, at the time of the injury, and being his servant de jure, the defendant has done an act which has deprived the father of his daughter's services, and which he might have exacted but for that injury. We are of opinion that the action is maintainable under the circumstances of this case, and therefore deny the motion for a new trial.

Motion denied.

SUTTON *v.* HUFFMAN.

Supreme Court of New Jersey, June, 1866. 3 Vroom, 58.

EXCEPTION by defendant to the charge of the court to the jury. The case is stated in the opinion of the court.

BEDLE, J. The exception in this case being so general, and the charge depending so much upon its application to the facts, it becomes necessary, in order to determine its correctness, to state the evidence pretty fully.

The action was brought by Adam Huffman for the seduction of his daughter and servant Margaret Ann, by Emanuel Sutton. As the result of it a child was born on the eleventh day of April, 1861. The daughter, at the time of the seduction, was about twenty-two years of age and the act occurred not at her father's house, but at her brother Gilbert's, who lived about a mile from the father's. Gilbert was an unmarried son of the plaintiff, and lived upon a farm called the Sutton farm, which appears to have been owned by the defendant's father. In the spring of 1859 Gilbert left his father's house to commence farming for himself, and first occupied what is called the Cranmer farm. Margaret Ann went with him, she then being under the age of twenty-one years. He remained upon said farm one year, and moved upon the Sutton farm.

The plaintiff testified that Gilbert rented the Cranmer farm, moved on it, and was single, and had no housekeeper, and that he told him he could have Margaret Ann whenever they could spare her; that she did not go there to receive wages; that she was with Gilbert a good part of the time there, and was at home some; that she came home very often on Saturdays and staid over Sunday, and sometimes would be at home nearly two weeks; that while Gilbert lived on the Sutton farm, she was about half the time there and the other half at her father's house; that she had part of her clothing at Gilbert's, but the chief part was at the plaintiff's house; that she had to have part at each place; that when she was at her father's, she did whatever her mother told her; that she milked, churned, got the meals, did housework, washing, and sewing; that the plaintiff did not pay her any wages, except such clothes as she needed, and he found her all her clothing, both while she was on the Cranmer farm and the Sutton farm; that her mother would send her shirts to make, and dresses for her sister (the father's family consisted of his wife and ten children, eight boys and two daughters — Margaret Ann, and her sister who was nine years old). That the child was born at the plaintiff's house, the physician's bill was paid by him, and he furnished her with everything necessary for her comfort during sickness, and considered himself bound to do it.

These leading facts were also substantially testified to by Gilbert and Margaret Ann. In addition to them Margaret Ann and Gilbert swear that Gilbert did not pay her any wages, and there was no agreement that he should. Margaret Ann testified that she always went to Gilbert's with the intention of returning to her father's, and that she was subject to the control and direction of her father while on the Cranmer and Sutton farms. The defendant sought to show, by the declarations of Margaret Ann and Gilbert, that Gilbert was to give her one dollar per week and half the poultry. Other evidence was offered by defendant to show that while on the Cranmer farm she had certain nice dresses there; also that Margaret Ann and Gilbert would sometimes go to the store, and each purchased things to be charged to Gilbert, the particulars of which do not appear; also that some shoemaking was done for her and charged to Gilbert. This evidence, together with some other of a general character, was offered undoubtedly to show that the relation of master and servant did not exist between the plaintiff and his daughter, but that she had left her father's house to do for herself.

A general exception was allowed to the whole charge upon the relationship of master and servant, which charge includes the observations of the justice upon the facts and the law. I will refer to such parts of the charge only as are objected to upon legal grounds.

The court charged that "it is necessary for the plaintiff to prove that she stood to him in the relation of servant, and that the defendant seduced and debauched her. And first, Did the relation of master and servant exist between the father and the daughter? This form of issue is adapted to the cause of loss of service merely, and was no doubt in its origin used to recover only the damages sustained by such loss and the expenses of the accompanying sickness. But in cases of this kind the loss of service has long ceased to be considered the true gravamen of the action. The real damages sought to be recovered are those occasioned, not by two or three months' illness of the daughter, but the permanent disgrace inflicted upon her and her family, and those subjecting the father to permanent sorrow. Notwithstanding this change in the object of the action the form still continues, and though the amount of service may be very small still the fact must be proved in order to sustain it. In its present scope this action is the only civil remedy for this kind of trespass. Your doubts, if you entertain any upon the first point, may be solved by answering two questions:—

"First. Did Margaret render any habitual service at or about the time she was debauched?

"Second. Was she emancipated?

"As to the first question, if you believe her father, brother, and herself, you cannot doubt that she did serve him at his home occasionally, in the usual way of service by daughters at home, and

by sewing for the family while at her brother's. The service need not be of any particular kind, quality, or amount. Was *any* service lost by the injury? is the question. It need not be menial service, which in law means within walls, or house service, nor need it be continuous or from day to day, nor need the daughter live in the family if she serves out of it. In short, any accustomed service lost by the injury will sustain the action, provided it be service due, and not a mere voluntary courtesy, and service will be regarded as due unless the child is emancipated.

"Second. Was Margaret emancipated? The arrival at twenty-one years does not emancipate a child; if the parent continues to exercise authority and the child to submit to it, the emancipation does not occur. And this is the case with most unmarried daughters whose parents are able to support them."

After referring to the evidence generally and reflecting upon it the court then stated to the jury that emancipation was a question of intention, and further said: "With these suggestions I leave it with you to determine whether Margaret or her father, or either of them, intended that she should be free of his control, and without title to his support and protection at the time of the injury. I do not think that the fact that she received wages, or by agreement between her and Gilbert was to receive wages, if that was so, of much if any importance to the question. This was a matter between her and Gilbert, and does not affect her position toward her father, unless she engaged her whole time to Gilbert and that for a period that would indicate her intention to be free from her father. The proof will hardly sustain this view. You have that testimony before you, and must give it such weight as you think it deserves. It consists altogether of hearsay of what Gilbert and Margaret said. It is only important with the view of impeaching them, and not of proving the fact against the plaintiff; as against him it is hearsay."

It is first objected that the question, "Did the relation of master and servant exist between the father and daughter?" does not specify the time when such relation should exist. This objection is more technical than real. Immediately before putting that question the court charges that "it is necessary for the plaintiff to prove that she stood to him in the relation of servant, and that the defendant seduced and debauched her." The jury could not have understood from this language otherwise than that the daughter must be the servant at the time of the seduction. The expression cannot fairly be construed to mean anything else; and besides that, the court in submitting the question of emancipation to the jury expressly applies it "at the time of the injury." If the defendant desired it more definite than stated, he should have requested it at the trial.

The other objections amount in brief to this; that Margaret, at the time of the seduction, was over the age of twenty-one years, and

in the actual service of her brother for wages, and that therefore she could not then be the servant of her father so as to sustain this action. In the first it is not proved that she did receive wages from her brother. As was correctly remarked by the judge at the circuit, the proof of what Gilbert and Margaret had said about that was "only important with the view of impeaching them, and not of proving the fact against the plaintiff; as against him it is hearsay;" but then if there had been competent evidence of the fact that she received wages, that in itself was not inconsistent with the relation of master and servant between her and her father. *Brown v. Ramsay*, 5 Dutch. 121. It was not necessary that she should be in the actual service of the father at the time of the seduction, if the relation of master and servant then existed. It is true that loss of service in fact, though very slight, must be shown where the daughter is over twenty-one years, the law not presuming service, as in a daughter under age, yet the loss of service in most cases where there is no personal violence occurs months after the seduction. If the relation of master and servant existed at the time, and the service lost afterwards was due the parent by virtue of such relationship as existed at the seduction, it is sufficient to sustain the action. If by reason of the act the master could not have the benefit of a service due him, by virtue of a relation then existing, even if he did not choose to exact it before, he is entitled to his action. The receipt of wages by the daughter would be a fact as bearing upon the question of emancipation, but beyond that it would not be inconsistent with the child being unemancipated, unless, as remarked by the judge, "she engaged her whole time to Gilbert, and that for a period that would indicate her intention to be free from her father." It does not so appear in the case, and the court wisely said, "the proof made will hardly sustain that view." As this case stands upon the evidence, the receipt of wages, if proved, would not be inconsistent with Margaret being unemancipated and the servant of the plaintiff.

When the daughter went to her brother's, she was under twenty-one years; while there she attained the age of twenty-one. The attaining that age is not ipso facto an emancipation of the child. That is the well-settled law of this State. 1 Harr. 122; 2 Zab. 409; 5 Dutch. 117.

It is true that the father may then refuse to further support and provide for the child, and the child may then refuse to serve or submit to the control of the parent, but unless either the parent or child has in fact effected the emancipation, the reciprocal rights and duties of the parent and child as to service and support are presumed to exist as before the age of twenty-one. Whether emancipation has occurred is a question of fact, to be determined by the circumstances of the case, according to the intention of the parties.

Such circumstances in favor of a continuance of the relation may consist of a tacit consent on the part of the child to serve as before, and on the part of the parent to provide as before. The conduct of each to the other may exist as before without any special contract or understanding, and emancipation would not be accomplished. The parent or¹ child, or either of them, may stand upon their rights to dissolve the relation at that time, if they wish, and if they do in fact the relation of master and servant is ended, but if they do not in fact, and they tacitly continue — the child to submit to the authority of the parent and to serve him in such way as is usual for children, and the parent to exercise authority and provide for the child as before — the child is unemancipated and third parties are bound to respect it. *Lipe v. Eisenlerd*, 32 N. Y. 229.

The question of emancipation, as one of fact, was distinctly left by the judge to the jury, and I find nothing in the charge inconsistent with the rule of law as laid down. The facts as they appear in the case would justify the jury in finding the daughter not emancipated. If she was not emancipated, then the action would be sustained by proof of loss of any service to which the plaintiff was entitled. Upon that point the judge charged "that any service lost by the injury is the question;" and further, "in short, any accustomed service lost by the injury will sustain the action provided it be service due and not a mere voluntary courtesy, and service will be regarded as due unless the child is emancipated." If the child was not emancipated service performed will be regarded as due the parent. The parent can sustain the action for the services of an unemancipated child over twenty-one years. *Brown v. Ramsay*, 5 Dutch. 118.

In the absence of proof that the parent and child, in the performance of service by the child, had contracted with each other as strangers, the law holds that service done by an unemancipated child is done because it is due to the parent. The service, as already stated, need not be rendered on the day of the injury. If the injury has occasioned any loss of service due by virtue of the relations, though the loss has been sustained long after the injury, it is sufficient. The charge upon this question was entirely correct. It was objected that the question, "Did Margaret render any habitual service at or about the time she was debauched?" should have been confined to the debauchment. This objection is already sufficiently answered, for the case does not proceed upon the idea that actual service is necessary at that time. The fact of habitual service about the time she was debauched was important as showing the relation of the child to the parent, — how they were accustomed to act towards each other. If before the seduction, and after, as was proved by the plaintiff, she did serve her father when at home, in the usual way of a daughter, and did also serve him at her brother's by sewing

¹ Sic, for and.

for her father's family, it showed a recognition on her part of the continuance of the relationship that existed before she was of age. These acts of service covering the time she was at Gilbert's, or about the time of the seduction, were of the utmost importance upon that subject.

The two questions — one as to the habitual service and the other as to emancipation — cover the whole case upon the relation of master and servant. The judge expressly stated, their doubts, if they had any upon that question, could be solved by answering those two questions, and those questions were correctly put and explained to accomplish that end. I see no error in the charge, and the judgment must therefore be *Affirmed.*

SOUTH v. DENNISTON.

Supreme Court of Pennsylvania, September, 1834. 2 Watts, 474.

WRIT OF ERROR. The action was an action on the case by Sarah South, plaintiff in error, against Joseph Denniston, for the seduction of the plaintiff's daughter. The action was brought by the mother, a widow, during the minority of her daughter. The latter went to live with the defendant's father at the age of eleven, and continued there until her seventeenth or eighteenth year, when the seduction took place, and she was begotten with child by the defendant. The daughter continued to live at the house until the month of June following, when she returned to her mother, with whom she lived until the child was born, in November. Her mother attended her during her lying-in sickness, before which and after her return she assisted her mother about the house. The court below instructed the jury that the plaintiff was not entitled to maintain the action. This was the subject of the assignment of error.

GIBSON, C. J. An action on the case for the seduction of a daughter is founded exclusively on the relation of master and servant, not parent and child; and the gist of it is consequential loss of service. By reason of a father's duty to educate and maintain his infant children he stands in the place of a master to them while he retains the right of personal control, even as to such of them as are not under his immediate dominion. But if this right be divested or expired, the relation can be renewed but by actual service, which, to found an action for the interruption of it, must have existed at the doing of the act of which the interruption is a consequence; the difference between it and any other state of servitude being that slighter acts of service are evidence of it. If, however, the right of control be not finally parted with, its existence without actual service is a sufficient foundation for a title to the action; and the decision in

Dean v. Peel, 4 East, 49, that actual employment in the service of another without an intent to return to the father's protection is fatal to an action in his name, has been justly repudiated, because his right to his daughter's service is independent of her will. But a mother, being at best in the category of a father who has parted with his right, can maintain the action but on proof of actual service at the time of the seduction. Not being bound to the duty of maintenance, she is not entitled to the correlative right of service; and standing as a stranger to her daughter in respect to these, the relation of mistress and servant can be constituted between them but as it may be constituted between strangers in blood, save that less evidence would perhaps be sufficient to establish it.

These are the fundamental principles of the action, deducible from all the authorities but *Sargent's Case*, 5 Cowen, 106, and from that case we are constrained to dissent. There it appears to have been decided that a widow whose daughter has been debauched, while out at service under indentures of apprenticeship subsequently cancelled, might maintain the action on the ground that she had succeeded to the parental rights of her husband; or else that the daughter was in her service at the time of the birth. But nothing is more sure than that a mother is not entitled to the service of her child by the common law; and the decision therefore obviously rests on some statutory provisions devolving the parental rights of the father upon his widow, which is not in force here. Yet even that would seem to be inadequate to the maintenance of the action by a widow who had parted with her right without reservation or recall; and even taking for granted that it reverted to her at the cancellation of the indentures, still it did not exist for the purpose of sustaining the relation of mistress and servant at the time of the seduction. The action was therefore not maintainable on the last ground, according to the decision of the same court in *Nickleson v. Stryker*, 10 Johns. 117. But whatever may have been decided, it requires but little aid from authority to sustain a principle so palpable as that a party cannot entitle himself to an action for what was no wrong to him, by employing a disabled servant. An action for loss of service would certainly not lie for beating one who was not in the plaintiff's service at the time, because it would be esteemed an act of folly in him to employ an unfit person; and it must necessarily be indifferent, in point of principle, whether the unfitness were caused by beating or impregnation. It was so considered in *Logan v. Murray*, 6 Serg. & R. 175, where the daughter had come pregnant into the mother's service, after the death of her father, in whose service she had been debauched. As to the child-bed expenses, assuming that the mother is liable to bear them (though we certainly have no law for it), these, though proper to swell the damages, are not a substantive ground of the action, as was held in *Logan v. Murray*; and as to the

argument so earnestly pressed upon us, that she is entitled to compensation for the increased risk of becoming chargeable for the daughter's maintenance as a pauper, it is enough to say that it would make the mother's right depend on the contingent inability of the daughter to maintain herself, which is not the foundation of the action by a father, whose duty to maintain is an immediate one and independent of all consideration of the child's own means. Besides, the principle would give the same right of action to the daughter for the seduction of the mother, and might, under circumstances, entitle the servant to damages for the impregnation of her mistress. That would be an inversion of the principles of the action laid down by this court in *Hornketh v. Barr*, 8 Serg. & R. 39; the authority of which is amply sufficient to sustain the decision of the court below. The daughter, residing in the family of the defendant's father at the time of the seduction, could in no respect be considered her mother's servant; and her subsequent acquirement of the character, if she ever did acquire it, could not vest in the latter a title to the action.

*Judgment affirmed.*¹

WESTLAKE v. WESTLAKE.

Supreme Court of Ohio, December, 1878. 34 Ohio St. 621.

ACTION by a married woman for alienation of her husband's affection. Verdict for the plaintiff. Motion by the defendant for new trial on the ground, first, that the petition did not set out a cause of action, secondly, for error of the court in admitting declarations of the husband as to the cause of his separating from his wife, and thirdly, because the court refused to charge, as requested, that the separation must have been caused maliciously.

The petition stated that "the plaintiff, Casander Westlake, for her cause of action, complains of said defendants for that said Welling B. Westlake is the son of said Joseph Westlake, and that she was married to said defendant Welling B. Westlake on the 17th day of September, A. D. 1867, in Jackson county, Ohio, and ever since has been and now is his lawful wife. That on the 21st day of October, A. D. 1873, at said county, said Welling B. Westlake was the husband of said plaintiff, and the said Joseph Westlake, well knowing the same, on said 21st day of October, A. D. 1873, and on divers other days and times prior thereto, wrongfully, unlawfully, and maliciously, without any just cause or provocation therefor, in order and for the

¹See *Anthony v. Norton*, 60 Kan. 341, holding that, in an action by a widowed mother for the seduction of her adult daughter, the court properly refused to charge the jury, at the defendant's request, "that the mere relation of mother and daughter will not permit a recovery by the former for the seduction of the latter."

express purpose of enticing and procuring the said Welling B. Westlake, her said husband, to become alienated in feeling and affection for and disgusted at and with the plaintiff as his wife, wickedly, wilfully, and maliciously spoke of and concerning her, said plaintiff, to her said husband and divers good people, and caused to be circulated and told to her said husband, for the purposes aforesaid, divers false, scandalous, and defamatory words of and concerning her, the said plaintiff, expressly in order to procure and cause said Welling B. Westlake to believe his said wife was an unchaste woman, and to cause him to become alienated from her and despise and refuse to live with her, and to induce said Welling B. Westlake to drive and banish her, said plaintiff, from the home, society, and companionship of her said husband, and in order to further procure and induce her said husband to become alienated from her, and drive and banish her from the home and companionship of her said husband, the said Joseph Westlake promised and proposed to reward the said Welling B. Westlake with property and money if he would expel and drive her, said plaintiff, from his home and companionship; and the plaintiff further avers that by reason of the false, scandalous, and defamatory words spoken and circulated as aforesaid, by said Joseph Westlake, of and concerning her, this plaintiff, and by reason of the promise of reward by him made to said Welling B. Westlake, and causing the same to be believed and relied on by her said husband for the purposes aforesaid, caused the said Welling B. Westlake to become so alienated and disaffected from and towards this plaintiff as his wife that the said Welling B. Westlake, on said 21st day of October, A. D. 1873, against the will and consent of this plaintiff, caused her, this plaintiff, to be removed from the home, society, and companionship, of her said husband, and then and there, by reason of the said conduct and sayings of said Joseph Westlake, the said Welling B. Westlake, against the plaintiff's will and without her consent, but in compliance with the request, orders, and commands of said defendant Joseph Westlake did take said plaintiff, with a small amount of personal property, into a wagon and hauled her and said property to the distance of seven miles, and there unloaded and deposited her and said property into a small tenement house on the land of T. C. Mitchell, and from thence hitherto, by reason of the conduct and sayings of said Joseph Westlake, refuses to permit her, said plaintiff, to return to him, said Welling B. Westlake, and cohabit with him as his wife, and refuses to provide for and support her, or to contribute anything toward her support. . . .

"She further says . . . the said Welling B. Westlake is unkind to and unfriendly with the plaintiff, and refuses to join with her in this action . . . and plaintiff therefore makes her said husband party defendant with said Joseph Westlake in this action."

GILMORE, C. J. The objection that the original petition does not

state facts sufficient to constitute a cause of action raises the question: Can a wife maintain an action, in her own name, for the loss of the society and companionship of her husband against one who wrongfully induces her husband to abandon or send her away? In answering this question, in view of the legislation of our own State on the subject of the rights of married women, it becomes necessary, not only to look to the doctrine of the common law on the subject, but also to examine the reasons upon which its doctrines rest.

In the early period of English jurisprudence the personal and marital rights of wives were, in some respects, exclusively cognizable in the spiritual courts, and, in other respects, as far as they were recognized at all, the courts of common law.

The common law considers marriage in no other light than a civil contract, some of the incidents of which will be mentioned hereafter. But the *holiness* of the matrimonial state is left entirely to the ecclesiastical law; the temporal courts not having to consider unlawful marriage as sinful but merely as a civil inconvenience. The punishment therefore, or annulling of incestuous or other unscriptural marriages, is the province of the spiritual courts, which act *pro salute animae*. 1 Black. 432.¹

The spiritual courts also had cognizance of matrimonial causes or injuries respecting the rights of marriage. Sir William Blackstone enumerates five of such causes, the third of which is: "The suit for restitution of conjugal rights, which is brought whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason, in which case the ecclesiastical jurisdiction will compel them to come together again." 3 Black. 94. "In the civil law the husband and wife are considered as two distinct persons, and may have separate estates, contracts, debts, and injuries, and therefore in our ecclesiastical courts a woman may sue and be sued without her husband." 1 Black. 444.

It is unnecessary to inquire into the extent to which a wife could obtain redress for injuries to her personal or marital rights in the spiritual courts. The above quotations are made for the purpose of showing that while it may be doubtful, in view of a recent discussion of the subject that will be noticed below, whether the common law regards the right of the wife to the consortium of her husband as of such a nature that pecuniary damages can be given her for being wrongfully deprived of it, yet in a jurisdiction that was exercised concurrently with that of the common law the rights of the wife in these respects were recognized and redressed when injured. The fact that instead of giving her damages for the loss of the consortium of her husband the spiritual courts restored to her the thing itself makes no difference in the principle involved. It is a distinct recognition of the rights of the wife in this respect, by the ecclesiastical

¹ That is not so now in England.

law of England, which was founded on the principles of the civil law.

But at common law the husband and wife are one person, that is, the very existence of the woman, together with all her personal rights, are suspended during the marriage, or at least are incorporated and consolidated into that of the husband; and upon this principle, of a union in person in husband and wife depend almost all the legal rights, duties, and disabilities that either of them acquires by the marriage. By the marriage the husband acquires an absolute title to all the personal property of the wife, and a right to reduce her choses in action to possession and thereby make them his own; also he becomes entitled to her labor and services or the proceeds of it, for which latter he may sue in his own name. An injury to the wife is in legal contemplation an injury to the husband only. For a slight battery of the wife the husband may recover damages, but for this he must join his wife in the action. If however she is beaten so enormously that the husband is thereby deprived for any time of her company and assistance, the law then gives him an action in his own name for this beating, *per quod consortium amisit*, in which he shall recover satisfaction in damages. 1 Black. 442; 3 Id. 139, 140.

By comparison the difference between the civil law as administered in the spiritual courts and the common law as administered in the temporal courts, in respect to the personal and marital rights of the husband and wife is plainly apparent. In the former they are regarded as distinct persons, and the wife could have her injuries, of which these courts had jurisdiction, redressed in her own name; while in the latter they are regarded as one person, — the husband whose name must always be used either jointly with the wife or alone for the redress of injuries to the person or personal rights of the wife.

If in this State the common-law dominion of the husband over the property and personal rights of the wife has been taken away from him and conferred upon her, and remedies in accordance with the spirit of the civil law have been expressly given to the wife for the redress of injuries to her person, property, and personal rights, all of which I hope to show has been done, then it must follow that she may maintain an action in her own name for the loss of the consortium of her husband against one who wrongfully deprives her of it, unless the consortium of her husband is not one of her personal rights. It has been already shown that this was one of her ecclesiastical-law rights; and I have said that it is doubtful whether it is one of her common-law rights. But before coming to the case in which the latter question is discussed I will recur briefly to the ecclesiastical law. The spiritual courts also had jurisdiction of defamations. In *Palmer v. Thorpe*, 4 Coke, 19, it is said: "Touching defamations determinable in the Ecclesiastical Court, it was re-

solved that such defamations ought to have three incidents," the first of which is, "That it concerns matters merely spiritual and determinable in the Ecclesiastical Court, as for calling him 'heretic,' 'schismatic,' 'adulterer,' 'fornicator,' &c."

And it was in consequence of such defamations being regarded as matters merely spiritual, that the temporal courts held such words as those above quoted not actionable per se; for if they were actionable in both the spiritual and temporal courts, then a party could be twice punished for the same words. *Byron v. Emes*, 12 Mod. 106; 2 Salk. 694. And here we have the reason why words imputing a want of chastity to a modest matron or a pure virgin, however publicly spoken, were not actionable at common law without an allegation of special damage. And here the test question under this rule of the common law may be asked: In an action of slander brought by a wife, the husband being joined for conformity, will the loss of the consortium of her husband, in consequence of speaking slanderous words concerning her, constitute special damage for which the action will lie?

This question was very fully discussed and considered in *Lynch v. Knight* and wife, 9 H. L. 577. This was an action brought by a wife, her husband being joined as plaintiff for conformity, against L. for a slander uttered by him to her husband, imputing to her that she had been "all but seduced by M. before her marriage, and that her husband ought not to suffer M. to visit at his house;" and the special damage alleged was that, in consequence of the slander, the husband had compelled her to leave his house and return to her father, whereby she lost the consortium of her husband. It was held that the cause of the complaint thus set forth would not sustain the action, inasmuch as the special damage relied upon did not arise from the natural and probable effect of the words spoken by the defendant, but from the precipitation or idiosyncrasy of the husband in dismissing his wife from his house when he was only cautioned not to let her mix in society. But Lord Campbell was of the opinion that a wife can maintain an action against a third person for words occasioning to her the loss of the consortium of her husband; and that had the words contained a direct charge of adultery against the wife, he should have thought the allegation of special damage sufficient to support the action. In which view Lord Cranworth was strongly inclined to concur.

Lord Campbell further said: "Although this is a case of the first impression, if it can be shown that there is presented to us a concurrence of loss and injury¹ from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of consortium or conjugal society can give a cause of action to the husband alone. If the special damage alleged to arise from the

¹ That is, *injuria* — wrong.

speaking of slanderous words, not actionable in themselves, result in pecuniary loss, it is a loss only to the husband; and although it may be the loss of the personal earnings of the wife living separate from her husband, she cannot join in the action. But the loss of conjugal society is not a pecuniary loss; though I think it may be a loss, which the law may recognize, to the wife as well as to the husband."

In the same case Lord Wensleydale stated that he had considerable doubt upon the point, but that he had made up his mind that the action would not lie. He said: "It is contended that it may be supported by analogy to the action which the husband may unquestionably maintain for an injury to wife, *per quod consortium amisit*. I agree with Baron Fitzgerald that the benefit which the husband has in the consortium of the wife is of a different character from that which the wife has in the consortium of the husband. The relation of husband and wife is in most respects entirely dissimilar from that of the master to the servant, yet in one respect it has a similar character. The assistance of the wife in the conduct of the household of the husband, and in the education of the children, resembles the service of a hired domestic, tutor, or governess; is of material value, capable of being estimated in money, and the loss of it may form the proper subject of an action, the amount of compensation varying with the position of the parties. This property is wanting in none. It is to the protection of such material interests that the law chiefly attends."

This case bears more directly upon the question under consideration than any other English case of which I am aware; for, if the loss of the consortium of the husband is sufficient to constitute special damage for which an action of slander would lie at common law, it seems to me that there can be no doubt that, under our statute, such loss will constitute a good cause of action in favor of the wife directly against one who wrongfully causes the loss; and while the discussion leaves the question in doubt at common law, the grounds upon which the judges differ are clearly indicated.

If the husband can maintain an action for the loss of the consortium of the wife, then it seems to me that Lord Campbell is clearly right when he says that he cannot allow the action, for this cause, to the husband alone, and that the loss of conjugal society, though not pecuniary, is a loss which the law may recognize to the wife as well as to the husband.

To avoid the force of this proposition the language of Lord Wensleydale is open to the inference that the husband cannot maintain an action for the loss of the consortium of the wife alone, and that it is the loss of her services, which are of material value, and not the loss of her society, which is of no pecuniary value, that constitutes the gist of the action which the husband may maintain for an injury to the wife; but when the action is well brought for

loss of services, it is further to be inferred that the jury may, as they always do, give damages, varying with the position of the parties, commensurate with the real injury including the loss of consortium.

This unsatisfactory state of the common law in reference to the rights of the wife is, I apprehend, partly owing to the subject being cognizable in two jurisdictions and partly to the common-law unity of person in husband and wife and the legal incidents that flow from this unity, both of which were noticed above.

Having shown the doubtful aspect of this question at common law, it will be my object now to show that the reasons that gave rise to those doubts either never existed in this State or that they have been swept away by legislation.

In the first place the subject of marriage and marital rights has never been cognizable in two independent jurisdictions in this State; hence in defamations there was no danger of a person being twice punished for the same words; and consequently it has long been the settled law of this State that words imputing a want of chastity to a woman, married or single, are per se actionable. *Sexton v. Todd*, Wright, 317; *Watson v. Trask*, 6 Ohio, 532; *Reynolds v. Tucker*, 6 Ohio St. 516. In this respect therefore the law of this State has never been in accord with the common law.

Neither could a suit for restitution of marital rights ever have been maintained in any of the courts of this State as it could in the ecclesiastical courts of England; and hence none of the embarrassments that grew out of two jurisdictions having cognizance of different branches of the same subject-matter have ever arisen here. With us, as shown below, whatever rights legal or equitable are recognized to the wife she may defend when threatened, or redress when injured, by actions in her own name.

In the next place let it be admitted that at common law Lord Wensleydale is correct in saying that the benefit which the husband has in the consortium of the wife is of a different character from that which the wife has in the consortium of the husband, and that the difference consists in the fact that the wife in some respects resembles a hired domestic, to whose services the husband is entitled in his own right; let us see if this doctrine of the common law has not been overthrown by the legislation of this State.

By the Act of 1861, S. & S. 389: "All personal property, including rights in action belonging to any woman at her marriage, or which may have come to her during coverture by gift, bequest, or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or have grown out of a violation of any of her personal rights, shall, together with all income, increase, and profit thereof, be and remain her separate property and under her sole control."

Section 28 of the Civil Code, as amended March 30, 1874, provides as follows: "Where a married woman is a party, her husband must be joined with her, except when the action concerns her separate property, or is upon a written obligation, contract, or agreement signed by her, or is brought by her to set aside a deed or will, or if she be engaged as owner or partner in any mercantile business and the cause of action grows out of or concerns such business, or is between her and her husband, she may sue or be sued alone. . . . But in no case shall she be required to prosecute or defend by her next friend."

This legislation in effect abolishes the common-law unity of person in husband and wife, so far as that unity is represented solely by the husband, and in its stead introduces a rule analogous to that of the civil law, by which the wife is so far regarded as a distinct person that she may have her separate property, contracts, credits, debts, and injuries growing out of a violation of any of her personal rights, all of which shall be and remain under her sole control; and in matters concerning them, or any of them, she may sue or be sued alone. Even the wages due for the wife's separate labor, which are of material value, capable of being estimated in money, and to which the common law chiefly attends in giving the husband an action for an injury to the wife, by reason of which he lost her services, has been taken from the husband and given to the wife; not only this, but she may sue for such wages and also for such injury in her own name, and the husband cannot, without her consent, acquire any interest in either.

Consequently, in this respect at least, under our legislation the benefit which the wife has in the consortium of the husband is equal to that which the husband has in the consortium of the wife. If at common law the husband could maintain an action for the loss of the consortium of the wife, I can see no reason why, under our law, the wife cannot maintain an action for the loss of the consortium of the husband. And if it be said that it was the loss of the services of the wife that constituted the gist of the husband's action in such cases, it is a sufficient answer to it to say that the reasons upon which this rule of the common law rested either never existed or have ceased to exist in this State.

In *Clark v. Harlan*, 1 Cin. Sup. Ct. R. 418, it is held that the wife may maintain an action for the loss of the conjugal society of the husband. In *Cooley on Torts*, 227, in a note referring to *Lynch v. Knight*, supra, the learned author closes by saying: "We see no reason why such an action should not be supported, where by statute the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her."

Is the right of the wife to the consortium of the husband one of her personal rights? If it is, then the statute makes the right of

action growing out of an injury to the right the separate property of the wife, for which the Code gives her a right to sue in her own name. Before marriage the man and woman are endowed with the same personal rights. If under no disability, each is competent to contract. When the agreement to marry is entered into, but before its consummation, each has the same interest in it, and either may sue for a breach of it by the other. In this State neither the husband nor wife unconditionally surrenders their personal rights by consummating the contract of marriage. On the contrary each acquires a personal as well as legal right to the conjugal society of the other, for the loss of which either may sue separately.

A majority of the court are of the opinion that there is a good cause of action stated in the petition.

Did the court err in admitting the declaration of the husband, made in the absence of the defendant, to the effect that the defendant was doing all he could to bring about a separation between the plaintiff and her husband? We think it did. This was clearly hearsay testimony, and nothing else.

In an action for enticing away the plaintiff's wife the declarations of the wife are not admissible in evidence. *Winsmore v. Greenbank*, Willes, 577. The confessions of the wife, in an action by the husband against her seducer, are not evidence against the defendant. Bull. N. P. 28. So in an action against a third party for inducing the plaintiff's husband to send her away the declarations of the husband, made in the absence of the defendant, are not admissible in evidence.

Did the court err in refusing to charge that, to entitle the plaintiff to recover the defendant must have maliciously caused the separation of the husband and wife? This charge ought to have been given. The term malice as applied to torts does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another. 11 Serg. & R. 39, 40. If the conduct of the defendant was unjustifiable and actually caused the injury complained of by the plaintiff, which was a question for the jury, malice in law would be implied from such conduct, and the court should have so charged.

For error in admitting the declarations of the husband, and in refusing to charge as requested, the judgment must be reversed, and the cause remanded to the Court of Common Pleas for a new trial.

[WHITE, J., delivered a dissenting opinion on the question of the sufficiency of the petition, and Okey, J., concurred in the same. They considered that the statutes had not conferred any new liabilities against third persons in favor of the wife, and that the question

whether the petition showed a cause of action was to be determined by the common law as modified by Ohio legislation; the ecclesiastical law of England having no proper bearing on the case.]

Judgment accordingly.

INTERFERENCE WITH CONTRACT.

CHAPTER X.

PROCURING BREACH OF CONTRACT.

LUMLEY *v.* GYE.

Queen's Bench of England, Trinity Term, 1853. 2 El. & B. 216.

THE case arose upon a demurrer to the declaration. The allegations of the declaration are sufficiently set out in the opinion.

CROMPTON, J. The declaration in this case consisted of three counts. The first two stated a contract between the plaintiff, the proprietor of the Queen's Theatre, and Miss Wagner, for the performance by her for a period of three months at the plaintiff's theatre; and it then stated that the defendant, knowing the premises and with a malicious intention, whilst the agreement was in full force, and before the expiration of the period for which Miss Wagner was engaged, wrongfully and maliciously enticed and procured Miss Wagner to refuse to sing or perform at the theatre, and to depart from and abandon her contract with the plaintiff, and all service thereunder, whereby Miss Wagner wrongfully, during the full period of the engagement, refused and made default in performing at the theatre; and special damage arising from the breach of Miss Wagner's engagement was then stated. The third count stated that Miss Wagner had been hired and engaged by the plaintiff, then being the owner of Her Majesty's Theatre, to perform at the said theatre for a certain specified period as the dramatic artiste of the plaintiff for reward to her in that behalf, and had become and was such dramatic artiste for the plaintiff at his said theatre for profit to the plaintiff in that behalf; and that the defendant, well knowing the premises and with a malicious intention, whilst Miss Wagner was such artiste of the plaintiff, wrongfully and maliciously enticed and procured her, so being such artiste of the plaintiff, to depart from and out of the said employment of the plaintiff, whereby she wrongfully departed from and out of the said service and employment of the plaintiff and remained and continued absent from such service and employment until the expiration of her said hiring and engagement to the plaintiff by effluxion of time; and special damage arising from the breach of Miss Wagner's engagement was then stated. To this declaration the defendant demurred; and the question for our decision is, whether all or any of the counts are good in substance.

The effect of the first two counts is, that a person, under a binding contract to perform at a theatre, is induced, by the malicious act of the defendant, to refuse to perform and entirely to abandon her contract; whereby damage arises to the plaintiff, the proprietor of the theatre. The third count differs, in stating expressly that the performer had agreed to perform as the dramatic artiste of the plaintiff, and had become and was the dramatic artiste of the plaintiff, for reward to her; and that the defendant maliciously procured her to depart out of the employment of the plaintiff as such dramatic artiste; whereby she did depart out of the employment and service of the plaintiff; whereby damage was suffered by the plaintiff. It was said, in support of the demurrer, that it did not appear in the declaration that the relation of master and servant ever subsisted between the plaintiff and Miss Wagner; that Miss Wagner was not averred, especially in the first two counts, to have entered upon the service of the plaintiff; and that the engagement of a theatrical performer, even if the performer has entered upon the duties, is not of such a nature as to make the performer a servant, within the rule of law which gives an action to the master for the wrongful enticing away of his servant. And it was laid down broadly, as a general proposition of law, that no action will lie for procuring a person to break a contract, although such procuring is with a malicious intention and causes great and immediate injury. And the law as to enticing servants was said to be contrary to the general rule and principle of law, and to be anomalous, and probably to have had its origin from the state of society when serfdom existed, and to be founded upon, or upon the equity of, the Statute of Laborers. It was said that it would be dangerous to hold that an action was maintainable for persuading a third party to break a contract, unless some boundary or limits could be pointed out; and that the remedy for enticing away servants was confined to cases where the relation of master and servant, in a strict sense, subsisted between the parties; and that, in all other cases of contract, the only remedy was against the party breaking the contract.

Whatever may have been the origin or foundation of the law as to enticing of servants, and whether it be, as contended by the plaintiff, an instance and branch of a wider rule, or whether it be, as contended by the defendant, an anomaly and an exception from the general rule of law on such subjects, it must now be considered clear law that a person who wrongfully and maliciously, or which is the same thing, with notice, interrupts the relation subsisting between master and servant, by procuring the servant to depart from the master's service or by harboring and keeping him as servant after he has quitted it, and during the time stipulated for, as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law. I think that the rule applies

wherever the wrongful interruption operates to prevent the service during the time for which the parties have contracted that the service shall continue; and I think that the relation of master and servant subsists, sufficiently for the purpose of such action, during the time for which there is in existence a binding contract of hiring and service between the parties; and I think that it is a fanciful and technical and unjust distinction to say that the not having actually entered into the service, or that the service not actually continuing, can make any difference. The wrong and injury are surely the same, whether the wrong-doer entices away the gardener, who has hired himself for a year, the night before he is to go to his work, or after he has planted the first cabbage on the first morning of his service; and I should be sorry to support a distinction so unjust, and so repugnant to common sense, unless bound to do so by some rule or authority of law plainly showing that such distinction exists. The proposition of the defendant, that there must be a service actually subsisting, seems to be inconsistent with the authorities that show these actions to be maintainable for receiving or harboring servants after they have left the actual service of the master. In *Blake v. Lanyon*, 6 T. R. 221, it was held by the Court of King's Bench, in accordance with the opinion of Gawdy, J., in *Adams v. Bafeald*, Leon. 240, and against the opinion of the two other judges who delivered their opinions in that case, that an action will lie for continuing to employ the servant of another after notice, without having enticed him away, and although the defendant had received the servant innocently. It is there said that "a person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master; the very act of giving him employment is affording him the means of keeping him out of his former service." This appears to me to show that we are to look to the time during which the contract of service exists, and not to the question whether an actual service subsists at the time. In *Blake v. Lanyon*, 6 T. R. 221, the party, so far from being in the actual service of the plaintiff, had abandoned that service, and entered into the service of the defendant in which he actually was; but inasmuch as there was a binding contract of service with the plaintiff, and the defendant kept the party after notice, he was held liable to an action. Since this decision, actions for wrongfully hiring or harboring servants after the first actual service had been put an end to have been frequent; see *Pilkington v. Scott*, 15 M. & W. 657; *Hartley v. Cummings*, 5 Com. B. 247. In *Sykes v. Dixon*, 9 A. & E. 693, where the distinction as to the actual service having been put an end to was relied upon for another purpose, it does not seem to have occurred to the bar or the court that the action would fail on account of there having been no actual service at the time of the second hiring or the har-

boring; but the question as to there being or not being a binding contract of service in existence at the time seems to have been regarded as the real question.

The objection as to the actual employment not having commenced would not apply in the present case to the third count, which states that Miss Wagner had become the artiste of the plaintiff, and that the defendant had induced her to depart from the employment. But it was further said that the engagement, employment or service, in the present case, was not of such a nature as to constitute the relation of master and servant, so as to warrant the application of the usual rule of law giving a remedy in case of enticing away servants. The nature of the injury and of the damage being the same, and the supposed right of action being in strict analogy to the ordinary case of master and servant, I see no reason for confining the case to services or engagements under contracts for service of any particular description; and I think that the remedy, in the absence of any legal reason to the contrary, may well apply to all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labor or service for a given time under the direction of a master or employer, who is injured by the wrongful act; more especially when the party is bound to give such personal services exclusively to the master or employer; though I by no means say that the service need be exclusive. Two *nisi prius* decisions were cited by the counsel for the defendant in support of this part of the argument. One of these cases, *Ashley v. Harrison*, 1 Peake's N. P. C. 194, s. c. 1 Esp. N. P. C. 48, was an action against the defendant for having published a libel against a performer, whereby she was deterred from appearing on the stage; and Lord Kenyon held the action not maintainable. This decision appears, especially from the report of the case in *Espinasse*, to have proceeded on the ground that the damage was too remote to be connected with the defendant's act. This was pointed out as the real reason of the decision by Mr. Erskine in the case of *Tarleton v. M'Gawley*, 1 Peake's N. P. C. 207, tried at the same sittings as *Ashley v. Harrison*. The other case, *Taylor v. Neri*, 1 Esp. N. P. C. 386, was an action for an assault on a performer, whereby the plaintiff lost the benefit of his services; and the Lord Chief Justice Eyre said that he did not think that the court had ever gone further than the case of a menial servant; for that, if a daughter had left the service of her father, no action *per quod servitium amisit* would lie. He afterwards observed that, if such action would lie, every man whose servant, whether domestic or not, was kept away a day from his business could maintain an action; and he said that the record stated that Breda was a servant hired to sing, and in his judgment he was not a servant at all; and he nonsuited the plaintiff. Whatever may be the law as to the class of actions referred to, for assaulting or debauching daughters or servants *per quod*

servitium amisit, and which differ from actions of the present nature for the wrongful enticing or harboring with notice, as pointed out by Lord Kenyon in *Fores v. Wilson*, 1 Peake's N. P. C. 55, it is clear from *Blake v. Lanyon*, 6 T. R. 221, and other subsequent cases, *Sykes v. Dixon*, 9 A. & E. 693, *Pilkington v. Scott*, 15 M. & W. 657, and *Hartley v. Cummings*, 5 Com. B. 247, that the action for maliciously interfering with persons in the employment of another is not confined to menial servants, as suggested in *Taylor v. Neri*. In *Blake v. Lanyon*, a journeyman who was to work by the piece, and who had left his work unfinished, was held to be a servant for the purposes of such an action; and I think that it was most properly laid down by the court in that case that a person who contracts to do certain work for another is the servant of that other (of course with reference to such an action) until the work be finished. It appears to me that Miss Wagner had contracted to do work for the plaintiff within the meaning of this rule; and I think that, where a party has contracted to give his personal services for a certain time to another, the parties are in the relation of employer and employed, or master and servant, within the meaning of this rule. And I see no reason for narrowing such a rule; but I should rather, if necessary, apply such a remedy to a case "new in its instance, but" "not new in the reason and principle of it" (per Holt, C. J., in *Keeble v. Hickeringill*, 11 East, 573, 575, note (a) to *Carrington v. Taylor*, 11 East, 571); that is, to a case where the wrong and damage are strictly analogous to the wrong and damage in a well-recognized class of cases. In deciding this case on the narrower ground, I wish by no means to be considered as deciding that the larger ground taken by Mr. Cowling is not tenable, or as saying that in no case except that of master and servant is an action maintainable for maliciously inducing another to break a contract to the injury of the person with whom such contract has been made. It does not appear to me to be a sound answer to say that the act in such cases is the act of the party who breaks the contract; for that reason would apply in the acknowledged case of master and servant. Nor is it an answer to say that there is a remedy against the contractor, and that the party relies on the contract; for, besides that reason also applying to the case of master and servant, the action on the contract and the action against the malicious wrongdoer may be for a different matter; and the damages occasioned by such malicious injury might be calculated on a very different principle from the amount of the debt, which might be the only sum recoverable on the contract. Suppose a trader, with a malicious intent to ruin a rival trader, goes to a banker or other party who owes money to his rival, and begs him not to pay the money which he owes him, and by that means ruins or greatly prejudices the party: I am by no means prepared to say that an action could not be maintained, and that damages, beyond the amount of the

debt, if the injury were great, or much less than such amount if the injury were less serious, might not be recovered. Where two or more parties were concerned in inflicting such injury, an indictment, or a writ of conspiracy at common law, might perhaps have been maintainable; and, where a writ of conspiracy would lie for an injury inflicted by two, an action on the case in the nature of conspiracy will generally lie; and in such action on the case the plaintiff is entitled to recover against one defendant without proof of any conspiracy, the malicious injury and not the conspiracy being the gist of the action. See note (4) to *Skinner v. Gunton*, 1 Wms. Saund. 230. In this class of cases it must be assumed that it is the malicious act of the defendant, and that malicious act only, which causes the servant or contractor not to perform the work or contract which he would otherwise have done. The servant or contractor may be utterly unable to pay any thing like the amount of the damage sustained entirely from the wrongful act of the defendant; and it would seem unjust and contrary to the general principles of law, if such wrongdoer were not responsible for the damage caused by his wrongful and malicious act. Several of the cases cited by Mr. Cowling on this part of the case seem well worthy of attention.

Without, however, deciding any such more general question, I think that we are justified in applying the principle of the action for enticing away servants to a case where the defendant maliciously procures a party, who is under a valid contract to give her exclusive personal services to the plaintiff for a specified period, to refuse to give such services during the period for which she had so contracted, whereby the plaintiff was injured.

I think, therefore, that our judgment should be for the plaintiff.

[ERLE and WIGHTMAN, JJ., delivered concurring opinions; the opinion of WIGHTMAN, J., contains a considerable discussion of the provisions and effect of the Statute of Laborers. COLERIDGE, J., dissented, holding that such actions as this are founded on the Statute of Laborers, and are confined to cases where the relation of master and servant exists between the employer and employee within the meaning of that statute, and that Miss Wagner was not a servant in this sense.]

Demurrer overruled.

BEEKMAN v. MARSTERS.

Supreme Court of Massachusetts, April, 1907. 195 Mass. 205.

THE case is stated in the opinion.

LORING, J. This suit came before the single justice on the report of a master to which no exceptions had been taken by either party,

and was reserved by him for our consideration and determination without any ruling or decision having been made.

The master found that on November 21, 1906, a contract was made between the plaintiff and the Jamestown Hotel Corporation. That corporation is erecting or has erected a hotel within the grounds of the Jamestown Exposition to be held between April 26 and November 30 of this year. This hotel is known as the Inside Inn, and is to be the only hotel within the exposition grounds. The plaintiff is the proprietor of a tourist agency, having an office at 293 Washington Street, Boston. By the contract between the plaintiff and the Hotel Corporation the plaintiff agreed to represent the Hotel Corporation throughout the New England States, to establish sub-agencies in that territory, and to use every possible endeavor personally and through his agents to book persons for the Inside Inn; and the defendant agreed: "That you [the plaintiff] shall be our exclusive agent in said territory;" to pay the plaintiff twenty-five cents a day for each person sent by him to the hotel; and to furnish the plaintiff with all necessary "literature."

Immediately upon being thus appointed the exclusive agent of the Hotel Corporation the plaintiff prepared and issued a "Fall Edition" of his "Tickets and Tours," in which, *inter alia*, a description is given of the Jamestown Exposition and of the Inside Inn. Following this is the statement that the plaintiff has been appointed New England agent for the exposition "and exclusive representative of the Inside Inn."

The defendant is found by the master to be a ticket and tourist agent, with an office at 298 Washington Street, Boston. On January 11, 1907, he went to Norfolk, Virginia, and called upon the officers of the Hotel Corporation there. At this time he "had seen the contract between the complainant and the hotel corporation, but had not read it, and knew that the company had practically consummated a contract making Beekman its sole representative in New England." The defendant at this interview told these officers "that it was a mistake for the corporation to give an exclusive agency in New England to any one man, and that more business would be brought to the company if all agents were given equal terms," and to enforce his arguments stated that the business done by the plaintiff was insignificant and that the statement was false which was made in the summer edition of his "Tickets and Tours" that certain persons therein named had his tickets and tours for sale. It appeared that the summer edition of this catalogue had been shown to the Hotel Corporation by the plaintiff when he made his contract with it.

The master found that "As a result of the solicitations or representations made by the respondent, the Jamestown Hotel Corporation on or about January 11, 1907, entered into an oral contract with

him, whereby it was agreed that the respondent should have the same rights that had been given to the complainant, and that he should be paid by the corporation twenty-five cents per capita per day for each guest whom he should secure for the Inside Inn."

The defendant then wrote to all men named in the plaintiff's catalogue except those having places of business in Canada, "and two or three others who appeared to have an independent agency business," telling them that the plaintiff had not an exclusive agency for New England and suggesting to them that they could get paid on the same footing as that upon which the plaintiff and the defendant were to be paid, if they chose to act for themselves and not as sub-agents of the plaintiff. He also wrote to the New York, New Haven, and Hartford Railroad Company, calling attention to the fact that some of the local ticket agents of that railroad company were advertised by the plaintiff as having his tickets and tours on sale, and suggesting that the railroad company would prefer to have all its agents strictly neutral in dealing with tourist concerns.

With respect to these letters the master made this finding: "The purpose of the respondent in sending the letters above mentioned appears from the letters themselves. I do not find that the respondent was actuated by malice toward the complainant."

The master further found that "The Jamestown Hotel Corporation has never at any time rescinded, or attempted to rescind, its said contract with the complainant;" that "The complainant has never waived any of his rights under the contract, and has never consented to any modification or alteration thereof except with reference to the bond" which is not material; and further, that "The Inside Inn is the only hotel which is located, or, under the contract of the company with the exposition, can be located, within the exposition grounds. The exclusive right to act as agent for the Inside Inn within the New England territory is a valuable right."

Lastly he has found: "There is a strong probability that a large tourist business will be done between Boston and New England and the Jamestown Exposition between April and the close of the exposition in November, and that many passengers will arrange for tours through various tourist agencies. In all probability many more passengers will buy tours and tickets from the complainant if he is the exclusive agent in New England for the Inside Inn than will be the case if other tourist agents also book guests or issue coupons or other devices which are accepted by the Hotel Corporation for accommodations. The damage which he will sustain if the respondent or other persons are allowed to act as agents or to book guests or issue coupons in this manner is incapable of accurate ascertainment. The loss to the complainant will not be merely the loss of the commission of twenty-five cents per capita per day, which would otherwise be

received from the hotel, but it will be the loss of profits on tours which he might otherwise be able to arrange.”

The result of the findings of the master must be taken to be that the defendant induced the Hotel Corporation to break its contract with the plaintiff, but that he did not do this to spite the plaintiff or for the purpose of injuring him, but for the purpose of getting for himself (the defendant) business which the plaintiff alone was entitled to under the contract with the Hotel Corporation, that is to say, to get business which the defendant could not get if the Hotel Corporation kept its agreement with the plaintiff.

Three defences have been set up by the defendant, namely: First, that he had a right to do what he did; second, that the plaintiff does not come into court with clean hands; and third, that the plaintiff has an adequate remedy at law by bringing an action for damages.

1. So far as the first defence is concerned, it is in effect that where A. is under a contract to serve the plaintiff for a specified time, the defendant, knowing that contract to be in existence, is justified in hiring A. away from the plaintiff before the expiration of that time, by giving him (A.) higher wages if he (the defendant) thinks that to be for his (the defendant's) pecuniary benefit. The ground on which the defendant bases this contention is that he has a right to compete with the plaintiff and that the right of competition is a justification for thus hiring away the plaintiff's servant.

We say that this is in effect the defence set up here because it has been settled in Massachusetts that there is no distinction between a defendant's enticing away the plaintiff's servant and a defendant's inducing a third person to break any other contract between him and the plaintiff. That was decided by this court in *Walker v. Cronin*, 107 Mass. 555; see p. 567. See also *Moran v. Dunphy*, 177 Mass. 485. In other words, this court there adopted the conclusion reached by the majority of the judges of the Queen's Bench in *Lumley v. Gye*, 2 El. & Bl. 216.¹ This is also the settled law of the Supreme Court of the United States. *Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway*, 151 U. S. 1. And it has been affirmed in England. *Bowen v. Hall*, 6 Q. B. D. 333. *Read v. Friendly Society of Operative Stonemasons*, [1902] 2 K. B. 88. *Glamorgan Coal Co. v. South Wales Miners' Federation*, [1903] 2 K. B. 545; S. C. on appeal, sub nomine *South Wales Miners' Federation v. Glamorgan Coal Co.* [1905] A. C. 239.²

No case has been cited which holds that a right to compete justifies a defendant in intentionally inducing a third person to take away from the plaintiff his contractual rights.

Not only has no case been cited in which that has been held, but

¹ *Ante*, p. 329.

² *Post*, p. 342.

no case has been cited in which that contention has been put forward.

It happens, however, that Mr. Justice Wells in defining the rights of competition has denied the existence of such a justification. In discussing the first count in *Walker v. Cronin*, 107 Mass. 555, 564, he said: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with." And it also happens that in *Read v. Friendly Society of Operative Stonemasons*, [1902] 2 K. B. 88, Darling, J., in discussing the rights of a labor union to induce the plaintiff's employers to break their contract of apprenticeship with him, denied it. He there said: "To resume, I think the plaintiff has a cause of action against the defendants, unless the court is satisfied that, when they interfered with the contractual rights of plaintiff, the defendants had a sufficient justification for their interference — to use Lord Macnaghten's words. This sufficient justification they may have had, and they may prove it; but the facts found by the county court judge and relied on by him as enough do not amount to one; for it is not a justification that 'they acted bona fide in the best interests of the society of masons,' i. e., in their own interests. Nor is it enough that 'they were not actuated by improper motives.' I think their sufficient justification for interference with plaintiff's right must be an equal or superior right in themselves, and that no one can legally excuse himself to a man, of whose contract he has procured the breach, on the ground that he acted on a wrong understanding of his own rights, or without malice, or bona fide, or in the best interests of himself, nor even that he acted as an altruist, seeking only the good of another and careless of his own advantage."

It is hard to see how this court could have decided *Garst v. Charles*, 187 Mass. 144, as it did were it the law that self interest is a justification for intentionally interfering with a plaintiff's contractual rights. The same is true of *Bowen v. Hall*, 6 Q. B. D. 333, if not of *Read v. Friendly Society of Operative Stonemasons*, [1902] 2 K. B. 88.

The argument here urged by the defendant comes from not distinguishing between two cases which not only are not the same but are altogether different so far as the question now under consideration is concerned.

If a defendant by an offer of higher wages induces a laborer who is not under contract to enter his (the defendant's) employ in place of the plaintiff's, the plaintiff is not injured in his legal rights. But it is a quite different thing if the laborer was under a contract with the plaintiff for a period which had not expired and the defendant,

knowing that, intentionally induced the laborer to leave the plaintiff's employ by an offer of higher wages, to get his (the laborer's) services for his (the defendant's) benefit.

A plaintiff's right to carry on business, that is, to make contracts without interference, is an altogether different right from that of being protected from interference with his rights under a contract already made. The existence of both rights and the difference between the two is recognized by Wells, J., in *Walker v. Cronin*, 107 Mass. 555; the first count in that case went on the first right, and the second and third counts on the second right. Again, the existence of the two is recognized and stated by Holmes, J., in *May v. Wood*, 172 Mass. 11, 14, 15.

Where the plaintiff comes into court to get protection from interference with his right of possible contracts, that is, of his right to pursue his business, acts of interference are justified when done by a defendant for the purpose of furthering his (the defendant's) interests as a competitor. It was this right that the plaintiff came into court to assert in *Carew v. Rutherford*, 106 Mass. 1, *Walker v. Cronin*, 107 Mass. 555 (so far as the first count was concerned), *Vegelahn v. Guntner*, 167 Mass. 92, *Plant v. Woods*, 176 Mass. 492, *Martell v. White*, 185 Mass. 255, *Berry v. Donovan*, 188 Mass. 353,¹ and *Pickett v. Walsh*,² 192 Mass. 572 (so far as the third prayer for relief was concerned); while the cases of *Walker v. Cronin*, 107 Mass. 555 (so far as the second and third counts were concerned), *May v. Wood*, 172 Mass. 11, *Garst v. Charles*, 187 Mass. 144, and *Pickett v. Walsh*, 192 Mass. 572 (so far as the second prayer for relief was concerned), are cases of the second class.

There are statements in opinions in Massachusetts and in England that a defendant is not liable for interference with a plaintiff's rights in both of these two classes of cases unless he acts maliciously within the meaning of malice as used in these opinions. In the case at bar there was no necessity of proving spite or ill will toward the plaintiff. This is not a case where there was an abuse of what, if done in good faith, would have been a justification, but a case where the defendant with knowledge of the contract between the plaintiff and the Hotel Corporation intentionally and without justification induced the Hotel Corporation to break it. That is proof of malice within the meaning of that word as used in these opinions. *South Wales Miners' Federation v. Glamorgan Coal Co.* [1905] A. C. 239.³

We do not rest our decision in this case (as we have been urged to do by the plaintiff) on cases like *Peabody v. Norfolk*, 98 Mass. 452, *Lumley v. Wagner*, 1 DeG., M. & G. 604, *Stiff v. Cassell*, 2 Jur. (N. S.) 348, *Donnell v. Bennett*, 22 Ch. D. 835, *Manchester Ship Canal Co. v. Manchester Racecourse Co.* [1901] 2 Ch. 37, *Manhattan*

¹ Post, p. 355.

² Post, p. 383.

³ Post, p. 342.

Manuf. Co. v. New Jersey Stock Yard Co. 8 C. E. Green, 161, *Western Union Telegraph Co. v. Rogers*, 15 Stew. (N. J.) 311, and *Baker v. Pottmeyer*, 75 Ind. 451. Those are cases where the plaintiff, having a contract which a court of equity would specifically enforce in whole or in part, brings a bill for specific performance against the other party to the contract, and as ancillary to a decree for specific performance against the other party to the contract asks that the third person who is about to contract or has contracted with him be also enjoined. The plaintiff made out his right to maintain this suit against the defendant alone by proving that he in fact induced the Hotel Corporation to break its contract with the plaintiff. In case of ordinary contracts (that is to say, contracts which will not be specifically enforced in equity), a plaintiff does not go far enough to render a defendant liable for unlawful interference with his contractual rights, when he proves that the defendant, in using the ordinary methods of promoting and increasing his own business, obtained business from the other party to the plaintiff's contract which that other party could not have given him without breaking his contract with the plaintiff, and that this was known to the defendant. To charge the defendant in such a case the plaintiff must prove that it was the act of the defendant which brought about the breach of the contract with the plaintiff.

Whether contracts which equity will specifically enforce stand on a different footing need not be considered.

2. The next defence is that the plaintiff does not come into court with clean hands. What the defendant relies on here is (1) the finding of the master as to the defendant's interview with the Hotel Corporation on January 11 of this year: "In talking with the officers of the corporation, he represented to the corporation and its officers that the complainant's statements in his catalogue with reference to the persons who had for sale his tickets and tours were false, and that the complainant's business was insignificant, and that he had been until recently a ticket scalper and that it was a mistake for the corporation to give an exclusive agency in New England to any one man, and that more business would be brought to the company if all agents were given equal terms. . . . There was no evidence offered to show that the statements made by Mr. Marsters were false." The defendant relies also (2) on this further finding of the master: "At the time the contract above referred to was made, the complainant had put in the hands of the officers of the Jamestown Hotel Corporation a copy of the summer edition of his catalogue called 'Big and Little Journeys,' which contained a list of persons at whose offices his tickets and tours were said to be on sale, but no other statement was made by him with reference to said persons. His tickets and tours were not on sale at these offices." Again (3) the defendant relies on the fact that the cut in the plaintiff's catalogue of the exte-

rior of the building, 293 Washington Street, represented that more of that building was taken up with his offices than was the fact; and lastly (4), that only one of the personally conducted tours advertised in that catalogue to take place did in fact take place.

It is found by the master that: "He [the plaintiff] is an agent of the Boston and Maine Railroad, and as such sells their tickets, and is a special tourist agent for the Boston and Maine Railroad. He is also an agent of various other roads and steamship lines, and tourist agent for still other roads and steamship lines. His business consists largely in the arranging of tours for individuals and parties, sometimes personally conducted, throughout the United States, Canada, and Mexico, and in providing through transportation and hotel accommodations for such parties or individuals." It is stated in the master's report that the plaintiff testified that his business amounted to \$200,000 a year. Again, it is found by the master as a fact that the plaintiff receives business from all parts of New England, and that "The complainant for about two years has had arrangements with various persons throughout the New England States whereby they, for a certain commission, will take orders for his tickets and tours from customers applying for them, and forward such orders to the complainant. The Boston and Maine agents are specially authorized by the Boston and Maine Railroad to thus co-operate with the complainant, and a large business is done by the complainant through these persons."

The ordinary rule is that it is only with regard to the plaintiff's rights against the defendant that the plaintiff must come into court with clean hands. *American Association v. Innis*, 109 Ky. 595. *Dering v. Winchelsea*, 1 Cox, 318. *Kinner v. Lake Shore & Michigan Southern Railway*, 69 Ohio St. 339. *Meyer v. Yesser*, 32 Ind. 294. *Lewis & Nelson's appeal*, 67 Penn. St. 153, 166.

If we assume in favor of the defendant (without making a decision on the point) that the plaintiff could not have maintained a bill for interference with his contractual rights if the contract in question had been procured by his fraud, the defendant has not made out a defence on that ground.

Taken as a whole, the legal significance of all the matters relied on by the defendant in this connection is that the plaintiff's contract with the Hotel Corporation was procured by fraud and that all the defendant has done is to tell that corporation the truth.

The answer to this is first, that the master has not found fraud; second, that the Hotel Corporation has not elected to rescind its contract with the plaintiff for fraud or for any other reason; and lastly, that the defendant did not confine himself to telling the corporation the truth about false representations of the plaintiff by which he procured the making of the contract, but went further and urged as an argument for inducing the corporation to break its contract

with the plaintiff that it was a mistake to appoint an exclusive agent at all, that they could make more money if their agency was not exclusive, no matter who the agent was.

3. The finding of the master as to the damages which the plaintiff is likely to suffer shows that an action at law would not give him an adequate remedy. Where the plaintiff proves that the defendant unlawfully interferes or threatens to interfere with his business or his rights under a contract, and further makes out in proof that damages will not afford an adequate remedy, equity will issue an injunction. The issuing of injunctions in *Vegeahn v. Guntner*, 167 Mass. 92, and similar cases, the last of which is *Pickett v. Walsh*, 192 Mass. 572,¹ are decisions directly in point. As to which see *Sherry v. Perkins*, 147 Mass. 212.

The terms of the injunction should be in substance that the defendant be restrained from directly or indirectly acting as agent of the Hotel Corporation within the New England States, and from preventing or seeking to prevent, directly or indirectly, the plaintiff from acting as exclusive agent of the Hotel Corporation for that territory.

So ordered.

GLAMORGAN COAL COMPANY, LIMITED *v.* SOUTH WALES MINERS' FEDERATION.

House of Lords of England, April, 1905. A. C. 239.

The Glamorgan Coal Company, Limited, and seventy-three other plaintiffs, owners of collieries in South Wales, brought this action against the South Wales Miners' Federation, its trustees and officers, and several members of its executive council, claiming damages for wrongfully and maliciously procuring and inducing workmen in the collieries to break their contracts of service with the plaintiffs, and alternatively for wrongfully and maliciously conspiring to do so. Evidence of the facts proved at the trial before Bigham, J., without a jury is set forth in the report of his judgment,² and the principal facts are stated by Lord James in this House. Briefly the case was as follows. The federation (which was registered as a trade union) was formed (*inter alia*) to consider trade and wages, to protect the workmen and regulate the relation between them and employers, and to call conferences. The wages were paid upon a sliding scale agreement, rising and falling with the price of coal. In November, 1900, the council of the federation, fearing that the action of merchants and middlemen would reduce the price of coal and consequently the rate of wages, resolved to order a "stop-day" on Novem-

¹ *Port.* p. 383.

² [1903] 2 K. B. 546-58.

ber 9, and informed the workmen. This order was obeyed by over 100,000 men, who took a holiday and thereby broke their contracts of service. At a conference held on November 12 between delegates of the men and the council a resolution was passed authorizing the council to declare a general holiday at any time they might think it necessary for the protection of wages and of the industry generally. In October and November, 1901, the council (as Bigham, J., found) ordered four stop-days for the same reason as before, and the men took a holiday on each of those days in breach of their contracts. Bigham, J., found that the action of the federation was dictated by an honest desire to forward the interest of the workmen and was not in any sense prompted by a wish to injure the masters, between whom and the men there was no quarrel or ill-will; that having been requested by the men by the resolution of November 12, 1900, to advise and direct them as to when to stop work, the federation and its officers did to the best of their ability advise and direct the men honestly and without malice of any kind against the plaintiffs, and therefore had lawful justification or excuse for what they did. The learned judge gave judgment for the defendants. This decision was reversed by the Court of Appeal (Romer and Stirling, L. JJ.; Vaughan Williams, L. J., dissenting), who entered judgment for the plaintiffs, the damages to be assessed.¹

LORD LINDLEY. My Lords, I agree so entirely with the judgments of Romer and Stirling, L. JJ., that I should say no more were it not for the great importance of some of the arguments addressed to your Lordships on this appeal and which deserve notice.

It is useless to try and conceal the fact that an organized body of men working together can produce results very different from those which can be produced by an individual without assistance. Moreover, laws adapted to individuals not acting in concert with others require modification and extension if they are to be applied with effect to large bodies of persons acting in concert. The English law of conspiracy is based upon and is justified by this undeniable truth.

But the possession of great power, whether by one person or by many, is quite as consistent with its lawful as with its unlawful employment; and there is no legal presumption that it will be or has been unlawfully exercised in any particular case. Some illegal act must be proved to be threatened and intended, or to have been committed, before any Court of justice in the United Kingdom can properly make such conduct the basis of any decision.

These remarks are as applicable to trade unions as to other less powerful organizations. Their power to intimidate and coerce is undoubted; its exercise is comparatively easy and probable; but it would be wrong on this account to treat their conduct as illegal in

¹ [1903] 2 K. B. 545.

any particular case without proof of further facts which make it so. It is not incumbent on a trade union to rebut any presumption of illegality based only on their power to do wrong. Freedom necessarily involves such a power; but the mere fact of its existence does not justify any legal presumption that it will be abused.

In the case before your Lordships there is proof that the members of the mining federation combined to break and did break their contracts with their employers by stopping work without proper notice and without proper leave. There is also proof that the officials of the federation assisted the men to do this by ordering them to stop work on particular days named by the officials. To break a contract is an unlawful act, or, in the language of Lord Watson in *Allen v. Flood*,¹ "a breach of contract is in itself a legal wrong." The form of action for such a wrong is quite immaterial in considering the general question of the legality or illegality of a breach of contract. Any party to a contract can break it if he chooses; but in point of law he is not entitled to break it even on offering to pay damages. If he wants to entitle himself to do that he must stipulate for an option to that effect. Non-lawyers are apt to think that everything is lawful which is not criminally punishable; but this is an entire misconception. A breach of contract would not be actionable if nothing legally wrong was involved in the breach.

The federation by its officials are clearly proved in this case to have been engaged in intentionally assisting in the concerted breach of a number of contracts entered into by workmen belonging to the federation. This is clearly unlawful according to *Lumley v. Gye*,² and *Quinn v. Leatham*,³ and the more recent case of *Read v. Friendly Society of Stonemasons*.⁴ Nor is this conclusion opposed to *Allen v. Flood*⁵ or the *Mogul Steamship Company's Case*,⁶ where there was no unlawful act committed.

The appellants' counsel did not deny that, in his view of the case, the defendants' conduct required justification, and it was contended (1.) that all which the officials did was to advise the men, and (2.) that the officials owed a duty to the men to advise and assist them as they did.

As regards advice, it is not necessary to consider when, if ever, mere advice to do an unlawful act is actionable when the advice is not libellous or slanderous. Nor is it necessary to consider those cases in which a person, whose rights will be violated if a contract is performed, is justified in endeavoring to procure a breach of such contract. Nor is it necessary to consider what a parent or guardian may do to protect his child or ward. That there are cases in which

¹ (1898) A. C. at p. 96.

² 2 E. & B. 216, ante, p. 329.

³ [1901] A. C. 495, post, p. 362.

⁴ [1902] 2 K. B. 732.

⁵ [1898] A. C. 1.

⁶ [1892] A. C. 25, post, p. 346.

it is not actionable to exhort a person to break a contract may be admitted; and it is very difficult to draw a sharp line separating all such cases from all others. But the so-called advice here was much more than counsel; it was accompanied by orders to stop, which could not be disobeyed with impunity. A refusal to stop work as ordered would have been regarded as disloyal to the federation. This is plain from the speeches given in evidence on the trial; and in my opinion it is a very important element in the case which cannot be ignored.

As regards duty the question immediately arises—duty to do what? The defendants have to justify a particular line of conduct, which was wrongful, i. e., aiding and abetting the men in doing what both the men and the officials knew was legally wrong. The constitution of the union may have rendered it the duty of the officials to advise the men what could be legally done to protect their own interests; but a legal duty to do what is illegal and known so to be is a contradiction in terms. A similar argument was urged without success in the case of the Friendly Society of Stonemasons¹ already referred to.

Then your Lordships were invited to say that there was a moral or social duty on the part of the officials to do what they did, and that, as they acted bona fide in the interest of the men and without any ill-will to the employers, their conduct was justifiable; and your Lordships were asked to treat this case as if it were like a case of libel or slander on a privileged occasion. My Lords, this contention was not based on authority, and its only merits are its novelty and ingenuity. The analogy is, in my opinion, misleading, and to give effect to this contention would be to legislate and introduce an entirely new law, and not to expound the law as it is at present. It would be to render many acts lawful which, as the law stands, are clearly unlawful.

My Lords, I have purposely abstained from using the word “malice.” Bearing in mind that malice may or may not be used to denote ill-will, and that in legal language presumptive or implied malice is distinguishable from express malice, it conduces to clearness in discussing such cases as these to drop the word “malice” altogether, and to substitute for it the meaning which is really intended to be conveyed by it. Its use may be necessary in drawing indictments; but when all that is meant by malice is an intention to commit an unlawful act without reference to spite or ill-feeling, it is better to drop the word malice and so avoid all misunderstanding.

The appeal ought to be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

[Concurring opinions were delivered by the Earl of Halsbury, L. C., Lord Macnaghten and Lord James.]

¹ [1902] 2 K. B. 732.

CHAPTER XI.

PROCURING REFUSAL TO CONTRACT.

MOGUL STEAMSHIP COMPANY *v.* MCGREGOR.

House of Lords of England, 1892. A. C. 25.

APPEAL from a decision of the Court of Appeal. 23 Q. B. D. 598. The action was brought by the appellants, the Mogul Steamship Company, Limited, against the respondents, McGregor, Gow & Co., T. Skinner & Co., and others. The statement of claim¹ alleged as follows:—

1. The plaintiffs have suffered damage by reason of the defendants (other than Sutherland, Barnes, Holt, and Swire), as and being owners of numerous steamers trading between ports in the Yangtse-Kiang River and London, and the defendants Sutherland, Barnes, Holt, and Swire, as and being interested in the steamers owned by the defendants, the Peninsular and Oriental Steam Navigation Company and the Ocean Steamship Company, conspiring together and with other persons at present unknown to the plaintiffs to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs from shippers to be carried from ports in the said river to London, for reward to the plaintiffs in that behalf.

2. The conspiracy consisted and consists of a combination and agreement by and amongst the defendants (other than Sutherland, Barnes, Holt, and Swire) as and being owners of steamers trading as aforesaid and having by reason of such combination and agreement control of the homeward shipping trade, and the defendants Sutherland, Barnes, Holt, and Swire, as and being interested in the steamers owned as aforesaid, pursuant to which, shippers were and are bribed, coerced, and induced to agree to forbear from shipping cargoes by the steamers of the plaintiffs.

3. In the alternative the conspiracy consisted and consists of a combination and agreement by and amongst the defendants, as and being owners of and interested in steamers as aforesaid, pursuant to which the defendants, with the intent to injure the plaintiffs and prevent them from obtaining cargoes for their steamers trading between

¹ This, under the Judicature Acts, has taken the place of the common law declaration.

the said ports, agreed to refuse and refused to accept cargoes from shippers except upon the terms that the said shippers should not ship any cargoes by the steamers of the plaintiffs, and by threats of stopping the shipment of homeward cargoes altogether, which threats they had the power and intended to carry into effect, did and do prevent shippers from shipping cargoes by the plaintiffs' steamers, and threaten and intend to continue so to do.

The plaintiffs claimed damages and an injunction to restrain the defendants from continuing the said wrongful acts. An application for an interim injunction was refused by Lord Coleridge, C. J., and Fry, L. J., 15 Q. B. D. 476. The following are the material facts proved at the trial of the action before Lord Coleridge, C. J., without a jury, 21 Q. B. D. 544:—

The appellant company was incorporated in 1883, and took over the steamers owned by Gellatly & Co., and among them the SS. Pathan, Afghan, and Ghazee, which were in China in the tea seasons of 1884 and 1885. Gellatly & Co. were the principal owners in and managers of the appellant company, and were also the London outward loading brokers of the Ocean Steamship Company. The respondents were owners of, or managing owners interested in, steamers engaged in the trade between China and England and elsewhere.

The "tea season" in China lasts about five to six weeks, beginning from the latter part of May. Tea exported during the season from Hankow for England is either shipped there (600 miles up the river Yangtse) direct for England or sent to Shanghai (at the mouth of the river) and there reshipped. The defendants desired to secure this trade for themselves and to maintain freights at remunerative rates. With this object they had in some previous years agreed among themselves to regulate the amount of tonnage to be sent up to Hankow and the freights to be demanded. In the spring of 1884 they held a conference, as the result of which they issued to merchants and shippers in China the following circular:—

"SHANGHAI, 10th May, 1884.

"To those exporters who confine their shipments of tea and general cargo from China to Europe (not including the Mediterranean and Black Sea ports) to the P. & O. S. N. Co.'s, M. M. Co.'s, O. S. N. Co.'s Glen, Castle, Shire, and Ben lines and to the SS. Oopack and Ningchow, we shall be happy to allow a rebate of 5 per cent. in the freights charged.

"Exporters claiming the returns will be required to sign a declaration that they have not made or been interested in any shipments of tea or general cargo to Europe (excepting the ports above named) by other than the said lines. Shipments by the SS. Albany, Pathan, and Ghazee on their present voyages from Hankow will not prejudice

claims for returns. Each line to be responsible for its own returns only, which will be payable half yearly commencing the 30th of October next. Shipments by an outside steamer at any of the ports in China or at Hong Kong will exclude the firm making such shipments from participation in the return during the whole six-monthly period within which they have been made, even although its other branches may have given entire support to the above lines.

“The foregoing agreement on our part to be in force from present date till the 30th of April, 1886.”

The plaintiffs (who were not members of the conference) were admitted to the benefits of the arrangement in respect of their vessels, the *Pathan* and *Ghazee*, for the homeward voyage of that season only.

In 1885 the defendants held another conference and came to a written agreement, dated the 7th of April, which regulated as between the defendants the tea trade with China and Japan, and provided for a certain division of cargoes, for the determination of the rates of freight and for the continuance of the rebate of 5 per cent. It also provided that if “outsiders” should start for Hankow, Conference steamers must meet them there, the selection of tonnage to be employed for this purpose being left to the Shanghai agents of the lines in consultation together, the number to be limited as much as consistent with effective opposition. That should there not be a Conference steamer in port or named for despatch within a week with available cargo space, shipments made by an outsider during that period should not invalidate the claim for the rebate of 5 per cent. on the freights. That agents of Conference steamers in China and Japan should be prohibited from being interested directly or indirectly in opposing steamers, or in the loading of sailing vessels of outsiders. And that the agreement might be terminated at any time on notice being given by the party wishing to retire to each of the others, but only by principals at home and not by agents abroad. Copies of this agreement were sent by the defendants to their agents at Shanghai. The plaintiffs desired to join this conference, but were excluded from it and from all its benefits, and in May, 1885, sent the *Pathan* and *Afghan* to Hankow to endeavor to secure homeward cargoes. The defendants’ agents at Shanghai thereupon sent to shippers at Hankow the following circular:—

“SHANGHAI, 11th May, 1885.

“Private. Referring to our circular dated the 10th of May, 1884, we beg to remind you that shipments for London by the *SS. Pathan*, *Afghan*, and *Aberdeen*, or by other non-Conference steamers at any of the ports in China or at Hong Kong, will exclude the firm making

such shipments from participation in the return during the whole six-monthly period in which they have been made, even although the firm elsewhere may have given exclusive support to the Conference lines."

The defendants also despatched some Conference steamers to Hankow to oppose the Pathan and Afghan and secure the freights, if possible, to the exclusion of non-Conference vessels, and with this object they underbid the plaintiffs and caused a general reduction of freights at Hankow. In the result the Pathan and Afghan obtained freights, but at very low and unremunerative rates. A letter of the 1st of May was put in from the chairman of the P. & O. Co. to their agent at Shanghai to the effect that if a firm of agents at Hankow (who acted there both for that company and for the plaintiffs) should carry out their intention of loading the plaintiffs' vessels home, the P. & O. Co. would have to close their relations with them. On the 28th of May, Gellatly & Co. were dismissed from the agency of the Ocean Steamship Company.

The action was brought on the 29th of May, 1885. It was agreed that the damages should, if necessary, be ascertained by a reference. Lord Coleridge, C. J., made an order entering judgment for the defendants with costs. 21 Q. B. D. 544. That order was affirmed by the Court of Appeal (Bowen and Fry, L. JJ.; Lord Esher, M. R., dissenting) 23 Q. B. D. 598.

LORD BRAMWELL. My Lords, the plaintiffs in this case do not complain of any trespass, violence, force, fraud, or breach of contract, nor of any direct tort or violation of any right of the plaintiffs, like the case of firing to frighten birds from a decoy; nor of any act the ultimate object of which was to injure the plaintiffs having its origin in malice or ill-will to them. These plaintiffs admit that materially and morally they have been at liberty to do their best for themselves without any impediment by the defendants. But they say that the defendants have entered into an agreement in restraint of trade; an agreement, therefore, unlawful; an agreement, therefore, indictable, punishable; that the defendants have acted in conformity with that unlawful agreement, and thereby caused damage to the plaintiffs in respect of which they are entitled to bring, and bring, this action.

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The plaintiffs also say that these things, or some of them, if done by an individual would be actionable. This need not be determined directly, because all the things complained of have their origin in what the plaintiffs say is unlawfulness, a conspiracy to injure; so that if actionable when done by one, much more are they when done by several, and if not actionable when done by several, certainly they are not when done by one. It has been objected by capable persons

that it is strange that that should be unlawful if done by several, which is not if done by one, and that the thing is wrong if done by one, if wrong when done by several; if not wrong when done by one, it cannot be when done by several. I think there is an obvious answer, indeed, two; one is, that a man may encounter the acts of a single person, yet not be matched against several.¹ The other is, that the act when done by an individual is wrong though not punishable, because the law avoids the multiplicity of crimes — *de minimis non curat lex*; while if done by several it is sufficiently important to be treated as a crime. Let it be then that it is no answer to the plaintiffs' complaint that if what they complain of had been done by an individual there would be no cause of action. There is the further question whether there is a cause of action, the acts being done by several.

The first position of the plaintiffs is that the agreement among the defendants is illegal as being in restraint of trade, and therefore against public policy, and so illegal. "Public policy," said Borough, J. (I believe quoting Hobart, C. J.), "is an unruly horse, and dangerous to ride."² I quote also another distinguished judge, more modern, Cave, J.: "Certain kinds of contracts have been held void at common law on the ground of public policy; a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy."³ I think the present case is an illustration of the wisdom of these remarks. I venture to make another. No evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing is against public policy, and void. How can the judge do that without any evidence as to its effect and consequences? If the shipping in this case was sufficient for the trade, a further supply would have been a waste. There are some people who think that the public is not concerned with this, — people who would make a second railway by the side of one existing, saying, "only the two companies will suffer," as though the wealth of the community was not made up of the wealth of the individuals who compose it. I am by no means sure that the conference did not prevent waste and was not good for the public. Lord Coleridge thought it was — see his judgment.

As to the suggestion that the Chinese profited by the lowering of freights, I cannot say it was not so. There may have been a monopoly or other cause to give them a benefit; but, as a rule, it is clear that the expense of transit, and all other expenses, borne by an exported article *that has a market price*, are borne by the importer, therefore, ultimately, by the consumer. So that low freights benefit him. To go on with the case, take it that the defendants had bound themselves to each other; I think they had, though they might withdraw.

¹ See Bigelow on Torts, pp. 240-241.

² *Richardson v. Mellish*, 2 Blig. at p. 252.

³ 1891, 1 Q. B. 595.

Let it be that each member had tied his hands; let it be that that was in restraint of trade; I think upon the authority of *Hilton v. Eckersley*, and other cases, we should hold that the agreement was illegal, that is, not enforceable by law. I will assume, then, that it was, though I am not quite sure. But that is not enough for the plaintiffs. To maintain their action on this ground they must make out that it was an offence, a crime, a misdemeanor. I am clearly of opinion it was not. Save the opinion of Crompton, J. (entitled to the greatest respect, but not assented to by Lord Campbell or the Exchequer Chamber), there is no authority for it in the English law.

It is quite certain that an agreement may be void, yet the parties to it not punishable. Take the case I put during the argument: a man and woman agree to live together as man and wife, without marrying. The agreement is illegal, and could not be enforced, but, clearly, the parties to it would not be indictable. It ought to be enough to say that the fact that there is no case where there has been a conviction for such an offence as is alleged against the defendants is conclusive.

It is to be remembered that it is for the plaintiffs to make out the case that the defendants have committed an indictable offence, not for the defendants to disprove it. There needs no argument to prove the negative. There are some observations to be made. It is admitted that there may be fair competition in trade, that two may offer to join and compete against a third. If so, what is the definition of "fair competition"? What is unfair that is neither forcible nor fraudulent? It does seem strange that, to enforce *freedom* of trade, of action, the law should punish those who make a perfectly honest agreement with a belief that it is fairly required for their protection.

There is one thing that is to me decisive. I have always said that a combination of workmen, an agreement among them to cease work except for higher wages, and a strike in consequence, was lawful at common law; perhaps not enforceable *inter se*, but not indictable. The Legislature has now so declared. The enactment is express, that agreements among workmen shall be binding, whether they would or would not, but for the Acts, have been deemed unlawful as in restraint of trade. Is it supposable that it would have done so in the way it has, had the workmen's combination been a punishable misdemeanor? Impossible. This seems to me conclusive that though agreements which fetter the freedom of action in the parties to it may not be enforceable, they are not indictable. See also the judgment of Fry, L. J., on this point. Where is such a contention to stop? Suppose the case put in the argument: In a small town there are two shops, sufficient for the wants of the neighborhood, making only a reasonable profit. They are threatened with a third. The two shop-

keepers agree to warn the intending shopkeeper that if he comes they will lower prices, and can afford it longer than he. Have they committed an indictable offence? Remember, the conspiracy is the offence, and they have conspired.¹ If he, being warned, does not set up his shop, has he a cause of action? He might prove damages. He might show that from his skill he would have beaten one or both of the others. See in this case the judgment of Lord Esher, that the plaintiffs might recover for "damages at large for future years." Would a shipowner who had intended to send his ship to Shanghai, but desisted, owing to the defendants' agreement, and on being told by them they would deal with him as they had with the plaintiffs, be entitled to maintain an action against the defendants? Why not? If yes, why not every shipowner who could say he had a ship fit for the trade, but was deterred from using it?

The Master of the Rolls² cites Sir William Erle, that "a combination to violate a private right in which the public has a sufficient interest is a crime, such violation being an actionable wrong." True, Sir William Erle means that where the violation of a private right is an actionable wrong, a combination to violate it, if the public has a sufficient interest, is a crime. But in this case I hold that there is no private right violated. His lordship further says: "If one goes beyond the exercise of the course of trade, and does an act beyond what is the course of trade, in order — that is to say, with intent — to molest the other's free course of trade, he is not exercising his own freedom of a course of trade, he is not acting in but beyond the course of trade, and then it follows that his act is an unlawful obstruction of the other's right to a free course of trade, and if such obstruction causes damage to the other he is entitled to maintain an action for the wrong."³ I may be permitted to say that this is not very plain. I think it means that it is not in the course of trade for one trader to do acts the motive of which is to damage the trade of another. Whether I should agree depends on the meaning to be put on "course of trade" and "molest." But it is clear that the Master of the Rolls means conduct which would give a cause of action against an individual. He cites Sir William Erle in support of his proposition, who clearly is speaking of acts which would be actionable in an individual, and there is no such act here. The Master of the Rolls says the lowering of the freight far beyond a lowering for any purpose of trade was not an act done in the exercise of their free right of trade, but for the purpose of interfering with the plaintiffs' right to a free course of trade; therefore a wrongful act as against the plaintiffs' right; and as injury to the plaintiffs followed, they had

¹ This seems to be using the word "conspiracy" in a sense different from the ordinary. It is generally considered to mean a combination to do an unlawful thing or a lawful thing in an unlawful way.

² Lord Esher, dissenting in the Court of Appeal.

³ 23 Q. B. D. 697.

a right of action. I cannot agree. If there were two shopkeepers in a village and one sold an article at cost price, not for profit therefore but to attract customers or cause his rival to leave off selling the article only, it could not be said he was liable to an action. I cannot think that the defendants did more than they had a legal right to do. I adopt the vigorous language and opinion of Fry, L. J.: "To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the powers of the courts."¹ It is a strong thing for the plaintiffs to complain of the very practices they wished to share in, and once did.

I am of opinion that the judgment should be affirmed.

Appeal dismissed with costs.

[The other judges concurred, some in opinions at length.]

Note: The following American cases were referred to by counsel for the plaintiffs: *Stanton v. Allen*, 5 Denio, 434; *State v. Glidden*, cited in *State v. Stewart*, 59 Am. Rep. at pp. 721, 724; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Penn. St. 173, 186; *Hooker v. Vandewater*, 4 Denio, 349; *Salt Co. v. Guthrie*, 35 Ohio St. 666, 672; *People v. North River Sugar Refining Co.* 54 Hun, 354.

In the Court of Appeal, Bowen, L. J., said upon the subject of malice (23 Q. B. D. 612-615): "We are invited by the plaintiffs' counsel to accept the position from which their argument started,—that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms 'maliciously,' 'wrongfully,' and 'injure' are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide.

"An intent to 'injure' in strictness means more than an intent to harm. It connotes an intent to do wrongful harm. 'Maliciously,' in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term 'wrongful' imports in its turn the infringement of some right. The ambiguous proposition to which we were invited by the plaintiffs' counsel, still, therefore, leaves unsolved the question of what, as between the plaintiffs and defendants, are the rights of trade. For the purpose of clearness I desire, as far as possible, to avoid terms in their popular use so slippery, and to translate them into less fallacious language wherever possible.

"The English law, which in its earliest stages began with but an imperfect line of demarcation between torts and breaches of contract, presents us with no scientific analysis of the degree to which the intent to harm, or in the language of the civil law, the *animus vicino nocendi*, may enter into or affect the conception of a personal

¹ 23 Q. B. D. 625, 626.

wrong. See *Chasemore v. Richards*.¹ All personal wrong means the infringement of some personal right. 'It is essential to an action in Tort,' say the Privy Council in *Rogers v. Rajendro Dutt*,² 'that the act complained of should under the circumstances be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do a man harm in his interests is not enough.'

"What then were the rights of the plaintiffs as traders as against the defendants? The plaintiffs had a right to be protected against certain kind of conduct; and we have to consider what conduct would pass this legal line or boundary. Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong (see *Bromage v. Prosser*; ³ *Capital & County Bank v. Henty*, per Lord Blackburn ⁴). The acts of the defendants which are complained of here were intentional, and were also calculated, no doubt, to do the plaintiffs damage in their trade. But in order to see whether they were wrongful we have still to discuss the question whether they were done without any just cause or excuse. Such just cause or excuse, the defendants on their side assert to be found in their positive right (subject to certain limitations) to carry on their own trade freely in the mode and manner that best suits them, and which they think best calculated to secure their own advantage.

"What then are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the Crown. . . . No man whether a trader or not can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. . . . But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than to pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill-will or a personal intention to harm, it is sufficient to reply (as I have already pointed out) that there was here no personal intention to do any other or greater harm to the

¹ 7 H. L. Cas. 349, at p. 388.

² 13 Moore, P. C. 209.

³ 4 B. & C. 247.

⁴ 7 App. Cas. 741, at p. 772.

plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of just cause or excuse acts done in the course of trade, which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. . . ."

BERRY *v.* DONOVAN.

Supreme Court of Massachusetts, June, 1905. 188 Mass. 353.

THE case is stated in the opinion.

KNOWLTON, C. J. This is an action of tort brought to recover damages sustained by reason of the defendant's malicious interference with the plaintiff's contract of employment. The plaintiff was a shoemaker, employed by the firm of Hazen B. Goodrich and Company at Haverhill, Massachusetts, under a contract terminable at will. At the time of the interference complained of he had been so employed for nearly four years. The defendant was the representative at Haverhill of a national organization of shoe workers, called the Boot and Shoe Workers' Union, of which he was also a member. The evidence showed that he induced Goodrich and Company to discharge the plaintiff, greatly to his damage. A few days before the plaintiff's discharge, a contract was entered into between the Boot and Shoe Workers' Union and the firm of Goodrich and Company, which was signed by the defendant for the union, the second clause of which was as follows: "In consideration of the foregoing valuable privileges, the employer agrees to hire as shoe workers, only members of the Boot and Shoe Workers' Union, in good standing, and further agrees not to retain any shoe worker in his employment after receiving notice from the union that such shoe worker is objectionable to the union, either on account of being in arrears for dues, or disobedience of union rules and laws, or from any other cause." The contract contained various other provisions in regard to the employment of members of the union by the firm, and the rights of the firm and of the union in reference to the services of these employees, and the use of the union's stamp upon goods to be manufactured.

The plaintiff was not a member of this union. Soon after the execution of this contract, the defendant demanded of Goodrich and Company that the plaintiff be discharged, and the evidence tended to show that the sole ground for the demand was that the plaintiff was

not a member of the union, and that he persistently declined to join it, after repeated suggestions that he should do so.

At the close of the evidence the defendant asked for the following instructions which the judge declined to give:

"1. Upon all the evidence in the case, the plaintiff is not entitled to recover.

"2. Upon all the evidence in the case, the defendant was acting as the legal representatives of the Boot and Shoe Workers' Union and not in his personal capacity, and therefore the plaintiff cannot recover.

"3. The contract between the Boot and Shoe Workers' Union and Hazen B. Goodrich and Company was a valid contract, and the defendant, as the legal representative of the Boot and Shoe Workers' Union, had a right to call the attention of Hazen B. Goodrich and Company, or any member of the firm, to the fact that they were violating the terms of the contract in keeping the plaintiff in their employment after the contract was signed, and insisting upon an observance of the terms of the contract, even if the defendant knew that the observance of the terms of the contract would result in the discharge of the plaintiff from their employment.

"4. The contract referred to was a legal contract, and a justification of the acts of the defendant, as shown by the evidence in this case."

"6. The defendant cannot be held responsible in this action, unless it appears that the defendant used threats, or some act of intimidation, or some slanderous statements, or some unlawful coercion to or against the employers of the plaintiff, to thereby cause the plaintiff's discharge; and upon all the evidence in the case there is no such evidence, and the plaintiff cannot recover."

The defendant excepted to the refusal, and to the portions of the charge which were inconsistent with the instructions requested. The jury returned a verdict of \$1,500 for the plaintiff. These exceptions present the only questions which were argued before us by the defendant.

The primary right of the plaintiff to have the benefit of his contract and to remain undisturbed in the performance of it is universally recognized. The right to dispose of one's labor as he will, and to have the benefit of one's lawful contract, is incident to the freedom of the individual, which lies at the foundation of the government in all countries that maintain the principles of civil liberty. Such a right can lawfully be interfered with only by one who is acting in the exercise of an equal or superior right which comes in conflict with the other. An intentional interference with such a right, without lawful justification, is malicious in law, even if it is from good motives and without express malice. *Walker v. Cronin*, 107 Mass. 555, 562. *Plant v. Woods*, 176 Mass. 492, 498. *Allen v. Flood* [1898] A. C. 1, 18. *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, 613. Read

v. Friendly Society of Operative Stonemasons, [1902] 2 K. B. 89, 96. *Giblan v. National Amalgamated Labourer's Union*, [1903] 2 K. B. 600, 617.

In the present case the judge submitted to the jury, first, the question whether the defendant interfered with the plaintiff's rights under his contract with Goodrich and Company, and secondly the question whether, if he did, the interference was without justifiable cause. The jury were instructed that, unless the defendant's interference directly caused the termination of the plaintiff's employment, there could be no recovery. The substance of the defendant's contention was, that if he acted under the contract between the Boot and Shoe Workers' Union and the employer in procuring the plaintiff's discharge, his interference was lawful.

This contention brings us to an examination of the contract. That part which relates to the persons to be employed contains, first, a provision that the employer will hire only members of the union. This has no application to the plaintiff's case, for it is an agreement only for the future, and the plaintiff had been hired a long time before. The next provision is, that the employer will not retain in his employment a worker, after receiving notice that he is objectionable to the union, "either on account of being in arrears for dues, or disobedience of union rules or laws, or from any other cause." The first two possible causes for objection could not be applied to persons in the situation of the plaintiff, who were not members of the union or amenable to its laws. As to such persons the only provision applicable was that the firm would not retain a worker who was objectionable to the union from any cause, however arbitrary the objection, or unreasonable the cause might be. This provision purported to authorize the union to interfere and deprive any workman of his employment for no reason whatever, in the arbitrary exercise of its power. Whatever the contracting parties may do if no one but themselves is concerned, it is evident that, as against the workman, a contract of this kind does not of itself justify interference with his employment, by a third person who made the contract with his employer. *Curran v. Galen*, 152 N. Y. 33. No one can legally interfere with the employment of another, unless in the exercise of some right of his own, which the law respects. His will so to interfere for his own gratification is not such a right.

The judge rightly left to the jury the question whether, in view of all the circumstances, the interference was or was not for a justifiable cause. If the plaintiff's habits, or conduct, or character had been such as to render him an unfit associate, in the shop, for ordinary workmen of good character, that would have been a sufficient reason for interference in behalf of his shopmates. We can conceive of other good reasons. But the evidence tended to show that the only reason for procuring his discharge was his refusal to join the union.

The question, therefore, is whether the jury might find that such an interference was unlawful.

The only argument that we have heard in support of interference by labor unions, in cases of this kind, is that it is justifiable as a kind of competition. It is true that fair competition in business brings persons into rivalry, and often justifies action for one's self, which interferes with proper action of another. Such action, on both sides, is the exercise by competing persons of equal conflicting rights. The principle appealed to would justify a member of the union, who was seeking employment for himself, in making an offer to serve on such terms as would result, and as he knew would result, in the discharge of the plaintiff by his employer, to make a place for the newcomer.

Such an offer, for such a purpose, would be unobjectionable. It would be merely the exercise of a personal right, equal in importance to the plaintiff's right. But an interference by a combination of persons, to obtain the discharge of a workman because he refuses to comply with their wishes, for their advantage, in some matter in which he has a right to act independently, is not competition. In such a case the action taken by the combination is not in the regular course of their business as employees, either in the service in which they are engaged, or in an effort to obtain employment in other service. The result which they seek to obtain cannot come directly from anything that they do within the regular line of their business as workers competing in the labor market. It can come only from action outside of the province of workingmen, intended directly to injure another, for the purpose of compelling him to submit to their dictation.

It is difficult to see how the object to be gained can come within the field of fair competition. If we consider it in reference to the right of employees to compete with one another, inducing a person to join a union has no tendency to aid them in such competition. Indeed the object of organizations of this kind is not to make competition of employees with one another more easy or successful. It is rather, by association, to prevent such competition, to bring all to equality, and to make them act together in a common interest. Plainly then, interference with one working under a contract, with a view to compel him to join a union, cannot be justified as a part of the competition of workmen with one another.

We understand that the attempted justification rests entirely upon another kind of so-called competition, namely, competition between employers and the employed, in the attempt of each class to obtain as large a share as possible of the income from their combined efforts in the industrial field. In a strict sense this is hardly competition. It is a struggle or contention of interests of different kinds, which are in opposition, so far as the division of profits is concerned.

In a broad sense, perhaps the contending forces may be called competitors. At all events, we may assume that, as between themselves, the principle which warrants competition permits also reasonable efforts, of a proper kind, which have a direct tendency to benefit one party in his business at the expense of the other. It is no legal objection to action whose direct effect is helpful to one of the parties in the struggle that it is also directly detrimental to the other. But when action is directed against the other, primarily for the purpose of doing him harm and thus compelling him to yield to the demand of the actor, and this action does not directly affect the property, or business, or status of the actor, the case is different, even if the actor expects to derive a remote or indirect benefit from the act.

The gain which a labor union may expect to derive from inducing others to join it, is not an improvement to be obtained directly in the conditions under which the men are working, but only added strength for such contests with employers as may arise in the future. An object of this kind is too remote to be considered a benefit in business, such as to justify the infliction of intentional injury upon a third person for the purpose of obtaining it. If such an object were treated as legitimate, and allowed to be pursued to its complete accomplishment, every employee would be forced into membership in a union, and the unions, by a combination of those in different trades and occupations, would have complete and absolute control of all the industries of the country. Employers would be forced to yield to all their demands, or give up business. The attainment of such an object in the struggle with employers would not be competition, but monopoly. A monopoly, controlling anything which the world must have, is fatal to prosperity and progress. In matters of this kind the law does not tolerate monopolies. The attempt to force all laborers to combine in unions is against the policy of the law, because it aims at monopoly. It therefore does not justify causing the discharge, by his employer, of an individual laborer working under a contract. It is easy to see that, for different reasons, an act which might be done in legitimate competition by one, or two, or three persons, each proceeding independently, might take on an entirely different character, both in its nature and its purpose, if done by hundreds in combination.

We have no desire to put obstacles in the way of employees, who are seeking by combination to obtain better conditions for themselves and their families. We have no doubt that laboring men have derived and may hereafter derive advantages from organization. We only say that, under correct rules of law, and with a proper regard for the rights of individuals, labor unions cannot be permitted to drive men out of employment because they choose to work independently. If disagreements between those who furnish the capital and those who perform the labor employed in industrial enterprises are to be settled

only by industrial wars, it would give a great advantage to combinations of employees, if they could be permitted, by force, to obtain a monopoly of the labor market. But we are hopeful that this kind of warfare soon will give way to industrial peace, and that rational methods of settling such controversies will be adopted universally.

The fact that the plaintiff's contract was terminable at will, instead of ending at a stated time, does not affect his right to recover. It only affects the amount that he is to receive as damages. *Moran v. Dunphy*, 177 Mass. 485, 487. *Perkins v. Pendleton*, 90 Maine 166, 176. *Lucke v. Clothing Cutters' and Trimmers' Assembly*, 77 Md. 396. *London Guarantee and Accident Co. v. Horn*, 101 Ill. App. 355; S. C. 206 Ill. 493.

The conclusion we have reached is well supported by authority. The principle invoked is precisely the same as that which lies at the foundation of the decision in *Plant v. Woods*, 176 Mass. 492. In that case although the power that lies in combination and the methods often adopted by labor unions in the exercise of it were stated with great clearness and ability, the turning point of the decision is found in this statement on page 502: "The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition." *Carew v. Rutherford*, 106 Mass. 1. *Walker v. Cronin*, 107 Mass. 555, and the other cases cited in *Plant v. Woods*, *ubi supra*, as well as the later case of *Martell v. White*, 185 Mass. 255, all tend to support us in our decision.

We long have had a statute forbidding the coercion or compulsion by any person of any other "person into a written or verbal agreement not to join or become a member of a labor organization as a condition of his securing employment or continuing in the employment of such person." R. L. c. 106, § 12. The same principle would justify a prohibition of the coercion or compulsion of a person into a written or verbal agreement to join such an organization, as a condition of his securing employment, or continuing in the employment of another person.

The latest English cases, which explain and modify *Allen v. Flood*, [1898] A. C. 1, seem in harmony with our conclusion. *Giblan v. National Amalgamated Labourers' Union*, [1903] 2 K. B. 600. *Quinn v. Leathem*, [1901] A. C. 495.¹ In the first of these it was held that a labor union could not use its power to deprive one of employment, in order to compel him to pay a debt in which the union was interested. The case of *Curran v. Galen*, 152 N. Y. 33, in the decision of which the judges of the court of appeals were unanimous, fully covers the present case. The principle involved in each of the

¹ Post, p. 362.

two cases is the same, and the language of the opinion in that case, in its application to this, is decisive. From the decision of *National Protective Assoc. v. Cumming*, 170 N. Y. 315, three of the seven judges dissented, and the result is to leave the law of New York in some uncertainty. The majority distinguished that case from *Curran v. Galen*, just referred to, and held that their decision was not inconsistent with it. They seem to have treated the arrangement to exclude persons not belonging to the union as entered into for legitimate purposes, having reference to actual or probable conditions in the employment; while the minority treated it as similar to the arrangement that appears in *Curran v. Galen*. See also *Jacobs v. Cohen*, 90 N. Y. Supp. 854; *Mills v. United States Printing Co.* 99 App. Div. (N. Y.) 605.

The law of Illinois is in accord with our conclusion. In *London Guarantee and Accident Co. v. Horn*, 101 Ill. App. 355; S. C. 206 Ill. 493, it was held that the refusal of a workman to accede to the request of another in a matter affecting the pecuniary interest of the other would not justify the procurement of his discharge from the employment in which he was engaged, under a contract terminable at will. See also, for kindred doctrines, *Doremus v. Hennessy*, 176 Ill. 608; *Christensen v. People*, 114 Ill. App. 40; *Mathews v. People*, 202 Ill. 389; *Erdman v. Mitchell*, 207 Penn. St. 79; *Perkins v. Pendleton*, 90 Maine, 166. Other cases bearing more or less directly upon the general subject are *Lucke v. Clothing Cutters' and Trimmers' Assembly*, 77 Md. 396; *Halder v. Cannon Manuf. Co.* 135 N. C. 392; *Chipley v. Atkinson*, 23 Fla. 206; *Blumenthal v. Shaw*, 77 Fed. Rep. 954; *Barr v. Essex Trades Council*, 8 Dick. 101; *Jersey City Printing Co. v. Cassidy*, 18 Dick. 759; *Crump v. Commonwealth*, 84 Va. 927; *Old Dominion Steamship Co. v. McKenna*, 30 Fed. Rep. 48; *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429; *Bailey v. Master Plumbers*, 103 Tenn. 99; *Delz v. Winfree*, 80 Tex. 400. It will be seen that in the different courts there is considerable variety and some conflict of opinion.

We hold that the defendant was not justified by the contract with Goodrich and Company, or by his relations to the plaintiff, in interfering with the plaintiff's employment under his contract. How far the principles which we adopt would apply, under different conceivable forms of contract, to an interference with a workman not engaged, but seeking employment, or to different methods of boycotting, we have no occasion in this case to decide.

The defendant contends that the judge erred in his instruction to the jury, in response to the defendant's special request at the close of the charge. The judge said, in substance, that if the defendant caused the firm to discharge the plaintiff, by giving the members to understand that, unless they discharged him, they "would be visited with some punishment, under the contract or otherwise, then that

interference would not be justifiable." This instruction, taken literally and alone, would be erroneous. Some grounds of interference would be justifiable while others would not. But considering the instruction in connection with that which immediately preceded it, and with other parts of the charge, it is evident that the judge was directing the attention of the jury to what would constitute an interference, not to what would justify an interference. He had just told them that, if all the defendant did was to call the attention of the firm to the provision of the contract, and the firm then, of their own motion, discharged the plaintiff, the defendant would not be liable. He then pursued the subject with some elaboration, and ended as stated above. Instead of saying, "then that interference would not be justifiable," he evidently meant to say, "then that would be interference which would create a liability, unless it was justifiable." Taking the charge as a whole, we think the jury were not misled by the inaccuracy of this statement.

Exceptions overruled.

QUINN v. LEATHEM.

Privy Council of England, August, 1901. A. C. 495.

THE case is stated in the opinion.

LORD BRAMPTON. My Lords, this case now awaiting your Lordships' final judgment . . . is an action originally brought in the High Court in Ireland by Henry Leathem, the respondent, as plaintiff, against Joseph Quinn (the sole appellant) and four other persons, named respectively John Craig (now dead), John Davey, Henry Dornan, and Robert Shaw, as defendants, to recover damages for a wrongful interference with the plaintiff's business of a butcher at Lisburn, a few miles from Belfast. For upwards of twenty years before July, 1895, Leathem had carried on business in Lisburn, having as one of his constant customers Andrew Munce (now also dead), who kept a butcher's shop at Belfast, to whom he supplied weekly twenty or thirty pounds' worth of the best meat; and he had in his employ as assistants several men at weekly wages.

In February, 1893, a trade union society was registered under the Trade Union Acts of 1871 and 1876, by the name of "The Belfast Journeymen Butchers and Assistants' Association." Of this society Craig was president, Quinn treasurer, and Davey secretary; they were original members; the other defendants, Dornan and Shaw, joined subsequently as mere ordinary members. Leathem was not a member, nor were any of his assistants. The members of the society amongst themselves soon adopted an unregistered rule that they

would not work with non-union men, nor would they cut up meat that came from a place where non-union hands were employed; but there was no evidence that, prior to July, 1895, this had been productive of any conflict between Leatham's men and the union.

Early in that month, however, Leatham, on the invitation of Davey, attended a meeting of the society held at Lisburn. All the defendants were there. The occurrences at this meeting showed the existence of an angry feeling, and an overbearing determination on the part of the defendants to compel Leatham to employ none but union men, which culminated in the lawless conduct, the subject of this action.

Leatham had at that time among his assistants a man named Robert Dickie, a family man, with young children dependent upon him; this man had been in his employ for ten years. He was desirous of keeping him and all the others employed by him in his service, but still of doing anything in reason to conciliate the society. But I had better let him tell his account of this meeting in his own words, as he told it to the jury. "I said that I came on behalf of my men, and was ready to pay all fines, debts, and demands against them; and I asked to have them admitted to the society. The defendant Shaw got up and objected to their being allowed to work on, and to their admission, and said that my men should be put out of my employment, and could not be admitted, and should walk the streets for twelve months. I said that it was a hard case to make a man walk the streets with nine small children, and I would not submit to it. Shaw moved a resolution that my assistants should be called out; a man named Morgan seconded the resolution, and it was carried. Craig was in the chair; I was sitting beside him. He said there were some others there that would suit me as well. He picked some out and said they could work for me. I said they were not suitable for my business, and I would keep the men I had. They said I had to take them. I said I would not put out my men. Craig then spoke, and told me my meat would be stopped in Andrew Munce's if I would not comply with their wishes."

The chairman spoke truly; for on September 6 the secretary of the society wrote to Leatham, asking "whether he had made up his mind to continue to employ non-union labor," adding, "If you continue as at present, our society will be obliged to adopt extreme measures in your case." He wrote also to Mr. Munce on September 13, stating that a deputation had been appointed to wait upon him to come to a decision in regard to his purchase of meat from Leatham & Sons, as they were anxious to have a settlement at once. To this letter Mr. Munce sent, on September 14, a very sensible reply: "It is quite out of my province to interfere with the liberty of any man. But why refer to me in the matter? I do not think it fair for you to come at me, seeing it appears to be the Messrs. Leatham

that you wish to interfere with." A deputation, which included Craig, Quinn, Shaw, and Dornan, had an interview with a son of Mr. A. Munce, and on September 17 he wrote to the secretary the reply of his father, "that he could not interfere to bring pressure to bear on Mr. Leatham to employ none but society men by refusing to purchase meat from him, as that would be outside his province and interfering with the liberty of another man." The 18th of September brought a definite announcement from the secretary to Mr. Munce that, having failed to make a satisfactory arrangement with Mr. Leatham, they had no other alternative but to instruct his (Munce's) employees "to cease work immediately Leatham's beef arrives." Thereupon Mr. Munce was constrained to send to Leatham on September 20 a telegram: "Unless you arrange with society you need not send any beef this week, as men are ordered to quit work." On and from that day Munce took no more meat from Leatham, to his substantial loss.

Another mode adopted by several of the defendants with a view to prevent persons dealing with Leatham was the publication throughout the district of Lisburn of "black lists" containing and holding up to odium, not only his name, but the names of persons who dealt with him, as a warning to those persons that if they wished their names to be removed from the lists they must have no more dealings with him or any other non-society shops. Amongst others, a man named McBride, a customer of Leatham, was operated on by this mode, and ceased to deal with him; attempts were also made by means of such lists to influence two other men named Davis and Hastings. With the object of further inconveniencing Leatham in his trade, two of his weekly servants, Rice and McDonnell, who had been non-union men, were somehow or other induced to join the society and to quit their service with Leatham. It is true they gave due notice of their intention to do so, and as regards them, therefore, no separate cause of action could be maintained. But it is significant that after they had left their service they were paid by the society during the time they were out of work weekly sums of money as compensation for the wages they would have earned with Leatham. As regards the assistant, Robert Dickie, he left his service without any notice in the middle of a week, and so wrongfully broke his contract with his employers, and there was an abundance of evidence that he was induced to do that wrongful act through the unjustifiable influence of the defendants, for Dickie's evidence at the trial was that he was brought out of Leatham's shop by Rice to a meeting of the society in a room over the defendant Dornan's shop; that Shaw (another defendant) was there; that they wanted him to leave Leatham because the rest were out, and promised to pay him what he had from Leatham; that he left, and was paid by Rice for the society and was then in Dornan's service.

The case came on for trial at the Belfast Assizes in July, 1896, before Fitzgibbon, L. J., and a special jury. The pleadings charged in the first four counts, as separate causes of action, (1) the procuring Munce to break contracts he had made with Leatham; (2) the publication by the defendants of "black lists"; (3) the intimidation of Munce and other persons to break their contracts; and (4) the coercion of Dickie and other servants to leave the service of the plaintiff. Each of these counts alleged that the acts complained of were done "wrongfully and maliciously, and with intent to injure the plaintiff, and to have occasioned him actual loss, injury, and damage." The fifth and last count charged, also as a separate cause of action, that the defendants unlawfully and maliciously conspired together, and with others, to do the various acts complained of in the previous counts, with intent to injure the plaintiff and his trade and business, and that by reason of the conspiracy he was injured and damaged in his trade. Damages and an injunction were claimed.

The evidence adduced I have already set forth substantially. At the conclusion of it Mr. O'Shaughnessy, Q. C., for the defendants, submitted that they were entitled to a nonsuit upon the grounds that there was no evidence of a contract between Munce and Leatham, nor of any pecuniary damage to the plaintiff by reason of the acts of the defendants, and that the acts of the defendants were legitimate. The learned Lord Justice refused to nonsuit, and I think he rightly refused. For there was clearly evidence for the consideration of the jury upon one or more of (I think upon all) the causes of action. I need not discuss that point further, for it was practically disposed of during the argument before this House.

No evidence was called for the defendants. I regret that no shorthand note of the summing-up of the Lord Justice was furnished to your Lordships. We have, however, a copy of the learned Judge's own notes and memoranda. From a careful perusal of these I am satisfied that every indulgence that could have been reasonably given to the learned counsel in presenting his case to the jury was allowed him, and I am satisfied that he must be taken to have acquiesced in the form in which the questions submitted for the consideration of the jury were left to them, even though it might otherwise have been open to criticism.

After commenting upon the evidence relied upon by the plaintiff as proof of actionable misconduct, he told the jury that they had to consider whether the interests and actions of the defendants went beyond the limits which would not be actionable, namely, securing or advancing their own interests or those of their trade by reasonable means, including lawful combination, or whether their acts, as proved, were intended and calculated to injure the plaintiff in his trade through a combination and with a common purpose to prevent the free action of his customers and servants in dealing with him, and

with the effect of actually injuring him as distinguished from acts legitimately done to secure or advance their own interests; that acts done with the object of increasing the profits or raising the wages of any combination of persons, such as the society to which the defendants belonged, by reasonable and legitimate means were perfectly lawful, and were not actionable so long as no wrongful act was maliciously — that is to say, intentionally — done to injure a third party. To constitute such a wrongful act for the purposes of this case, he told the jury that they must be satisfied that there had been a conspiracy, a common intention and a combination on the part of the defendants, to injure the plaintiff in his business, and that acts must be proved to have been done by the defendants in furtherance of that intention which had inflicted actual money loss upon the plaintiff in his trade. And having so told the jury, he proposed to put to them as the question they had to try upon the evidence, Whether the acts of the defendants were or were not in that sense actionable?

I have thought it right, as near as possible, to follow the language of the Lord Justice, for that charge was delivered before *Allen v. Flood*, [1898] A. C. 1, was decided in this House. In substance I think it was correct, having regard to the case before him. In some respects it seems to me that it was a little too favorable to the defendants, but even had it been otherwise it was uttered in the presence of the defendants' counsel, who desired and was allowed then and there to make such objections as he thought fit to it. He made four only: first, that the judge had given no definition of damage; second, that he had told the jury that the liability of the defendants depended on a question of law. These two questions were to my mind conclusively answered in the summing-up: see p. 23 of Appendix.

A third objection was that the question relating to the black list should be separately left to the jury. It was then so left, and as to that the judge directed them that there was not sufficient evidence to connect Quinn and Craig with the black lists. By this I take it he meant not as an independent cause of action, there being, in fact, no evidence of Quinn's personal participation in the publication of those lists. But that left him still affected by them as overt acts of the conspiracy, for each of which every one of the conspirators is liable, and the evidence touching the black lists was beyond all question admissible under the conspiracy count.

The fourth objection was that there was no evidence of any binding contract having been broken through the action of the defendants; but the judge then again declined to withdraw that question of contract from the jury, and I think he was right in so refusing at that stage of the trial; and at a later stage, after the whole matter had been disposed of under the conspiracy count, he rightly refrained

from putting the question at all, because it had become unnecessary. At the request of the learned counsel, however, he divided the single general question he at first proposed into the three separate questions—(1) Did the defendants, or any of them, wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff? (2) Did the defendants, or any two or more of them, maliciously conspire to induce the plaintiff's customers or servants named in the evidence, or any of them, not to deal with the plaintiff or not to continue in his employment, and were such persons so induced not to do so? (3) Did the defendants Davey, Dornan, and Shaw, or any of them, publish the "black list" with intent to injure the plaintiff in his business, and, if so, did the publication so injure him? The jury answered each of these questions in the affirmative, and assessed the damages against all the defendants at £200; and with regard to the third question, they found against the defendants Dornan, Davey, and Shaw, with an additional £50 as damages against them only. Judgment was given in accordance with that verdict.

If, my Lords, before that judgment was given the counsel for either party had felt it of importance that the specific issues raised upon each count should be determined by the jury, the learned judge would, no doubt, have applied himself to attain that object; but when, as it oftentimes happens in the course of a trial, it is obvious to everybody concerned in it that the case may conveniently be determined by the answer of the jury to one general comprehensive question involving the whole of the material matters at issue, and all parties either expressly or tacitly acquiesce in that view, and such question is accordingly put to and answered by the jury, neither party can afterwards hark back to the original issues raised by the pleader on the record long before it was possible for him to know how the case can best be dealt with when the evidence is all disclosed. Here the real substantial question was whether there had existed between all or any two or more of the defendants an unlawful conspiracy to injure the plaintiff in his trade, and, if so, whether the plaintiff had been specially injured thereby, all the wrongful acts charged in the previous counts being treated as overt acts of such conspiracy. To support that conspiracy count it was not essential that every overt act alleged should be proved, but only a sufficient number of them to support the count. The issues on that count having been found by the jury, and damages assessed in favor of the plaintiff, the separate issues became immaterial, since they had already been treated as incorporated for all purposes of the action in it. I note, in confirmation of this, that the Lord Justice pointedly told the jury that proof of a conspiracy was essential to the support of the action.

In substance, this finding of the jury amounted to a general verdict against all the defendants, except on the issue relating to the black

lists, with £200 damages, and as to that issue against Davey, Dornan, and Shaw only, with separate and further damages, £50.

Rightly understood, I think the judgment in *Allen v. Flood*, [1898] A. C. 1, is harmless to the present case. But I need hardly say that, in order properly to understand and appreciate it, it is essential to ascertain what were the material facts assumed to exist by their Lordships who assented to that judgment, and what were the principles of law applied by them to those facts. This necessity will be more apparent when it is realized that unanimity of opinion as to the facts certainly did not prevail, that the judges who were called upon to render their assistance to the House were requested to answer this one simple question only, namely, "Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" This evidence was only to be found in the Appendix handed to each of the judges as containing the evidence referred to, and to that evidence the judges naturally applied themselves, and upon it their opinions were formed. That evidence of the plaintiffs' witnesses most certainly did not altogether coincide with some very material facts assumed by their Lordships; this will account for variance in the views expressed as to the legal rights and alleged wrongful acts of the parties. It would be an endless task to endeavor to reconcile all these differences of fact and opinion; I will not, therefore, make the attempt.

Some of this confusion arose no doubt from the course taken, rightly or wrongly at the trial, when all questions of conspiracy, intimidation, coercion, or breach of contract were withdrawn from the jury, the only matters of fact found by them being that Allen maliciously induced the Glengall Company to discharge Flood and Taylor from their employment, and not to engage them again, and that each plaintiff had suffered £20 damages.

I collect from the case, as reported, that it was assumed by their Lordships that the Glengall Company were under no contractual obligation to retain the plaintiffs Flood and Taylor in their service for any duration of time, but might dismiss them from their employment at any moment it was their will so to do, and that the boiler-makers were working under the same conditions; that Allen in making the communication which induced the Glengall Company to dismiss the plaintiffs was doing only that which he had a legal right to do, and they held, therefore, that the plaintiffs had no legal cause of action against either the Glengall Company or the defendant, and that the mere fact as found by the jury that the defendant was actuated by a malicious motive could not convert a rightful into a wrongful act.

This latter proposition, that the exercise of an absolutely legal right cannot be treated as wrongful and actionable merely because a malicious intention prompted such exercise, was established as clear law by this House in *Bradford Corporation v. Pickles*, [1895] A. C.

587, and it is now too late to dispute it, even if one were disposed to do so, which I am not. It must not, however, be supposed that a malicious intention can in no case be material to the maintenance of an action. It is commonly used to defeat the defence of privilege to do or to say that which without privilege would be wrongful and actionable.

Take the familiar instance of an action for malicious prosecution. It is not a wrongful act for any person, who honestly believes that he has reasonable and probable cause, though he has it not in fact, to put the criminal law in motion against another; but if to the absence of such reasonable and probable cause a malicious motive operating upon the mind of such prosecutor is added, that which would have been a rightful (in the sense of a justifiable) act if done without malice becomes with malice wrongful and actionable. What would constitute such malice it is not material for the purposes of this case to define. Of course, if when he instituted criminal proceedings the prosecutor knew he had no reasonable ground for the steps he was taking, the definition of malice given by Bayley, J., in *Bromage v. Prosser*, 4 B. & C. 247; 28 R. R. 241, would distinctly apply, and no further proof of malice would be required; but if he really believed he had such reasonable cause, although in fact he had it not, and was actuated not by such belief alone, but also by personal spite or a desire to bring about the imprisonment of or other harm to the accused, or to accomplish some other sinister object of his own, that personal enmity or sinister motive would be quite sufficient to establish the malice required by law to complete a cause of action — that is, if such malice was found as a fact by the jury.

In this case the alleged cause of action is very different from that in *Allen v. Flood*, [1898] A. C. 1. It is not dependent upon coercion to break any particular contract or contracts, though such causes of action are introduced into the claim; but the real and substantial cause of action is an unlawful conspiracy to molest the plaintiff, a trader in carrying on his business, and by so doing to invade his undoubted right, thus described by Alderson, B., in delivering the judgment of the Exchequer Chamber in *Hilton v. Eckersley*, 6 E. & B. 74: “Prima facie it is the privilege of a trader in a free country in all matters not contrary to law to regulate his own mode of carrying it on according to his own discretion and choice. If the law has in any matter regulated or restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion.”

To this I would add the emphatic expression of the Lord Chancellor, Lord Halsbury, in the *Mogul Case*, [1892] A. C. 38:¹ “All are free to trade upon what terms they will;” and of Lord Bramwell, who in *Reg. v. Druitt*, 10 Cox C. C. 600, in a passage quoted by Lord Halsbury in the same case, [1892] A. C. at p. 73, said: “The liberty

¹ Ante, p. 346.

of a man's mind and will to say how he should bestow himself and his means, his talents and his industry, was as much a subject of the law's protection as was that of his body." Again, Sir W. Erle thus expresses himself: "Every person has a right under the law as between himself and his fellow-subjects to full freedom in disposing of his own labor or his own capital according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others." Erle on Trade Unions, p. 12. I am not aware that the rights thus stated have ever been seriously questioned. I rest my judgment upon the principle expressed in these few sentences. I seek for no more.

The remedy for the invasion of a legal right is thus stated by Lord Watson in his judgment in *Allen v. Flood*, [1898] A. C. at p. 92: "Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences in so far as these are injurious to the person whose right is infringed."

I cannot suppose any intelligent person reading the evidence adduced on the trial of this case failing to come to the conclusion that the acts complained of amounted to a serious and wrongful invasion of the plaintiff's trade rights, and I am at a loss to comprehend upon what ground it is that the defendants seek to justify or excuse their action towards him.

As members of a trade union society they have no more legal right to commit what would otherwise be unlawful wrongs than if the association to which they are attached had never come into existence. They have no more right to coerce others pursuing the same calling as themselves to join their society, or to adopt their views or rules, than those who differ from them and belong to other trade associations would have a right to coerce them. The legislature in conferring upon trades unions such privileges as are contained in the Trade Union Acts, 1871 and 1876, does not empower them to do more than make rules for the regulation of their own conduct and to provide for their own mutual assistance, and leaves each member as free to cease to belong to it and to repudiate every obligation for future observance of its rules as though he had never joined it; and most certainly it has not conferred upon any association or any member of it a license to obstruct or interfere with the freedom of any other person in carrying on his business or bestowing his labor in the way he thinks fit, provided only that it is lawful: see *Erle, J.*, in *Reg. v. Rowlands*, (1851) 2 Den. C. C. 364; and although a combination of members of a trade union for certain purposes is no longer unlawful and criminal as a conspiracy merely because the objects of that combination are in restraint of trade, no protection is given to any

combination or conspiracy which before the passing of the Act of 1871 would have been criminal for other reasons.

Not a word is to be found in the Trade Union Acts or in the Conspiracy Act of 1875 sanctioning such conduct as that complained of. Indeed, one cannot read the 7th section of the latter Act imposing penalties for undue coercion and intimidation without seeing that it had no intention to tolerate such proceedings as in this case are complained of, but rather to protect those upon whom coercive measures might be practised. I may also note that the 3rd section of that Act does not apply to civil proceedings by action.

It would not be useful to examine again all the numerous cases upon the citation and discussion of which much time has been expended, for not one of them would really assist the appellant in defence of his or his co-conspirators' conduct.

The Mogul Case, [1892] A. C. 25, contains no doubt a mass of valuable, interesting, and useful law as to the length to which competing traders may go in pushing and endeavoring to promote their respective interests, and yet keep within bounds that are legal, though the stronger and more wealthy of them may sometimes press hardly upon the weaker whose capital is limited. One trader may by his mode of carrying on his trade hold out attractions and allurements which may enlist so many of his rival's customers as will well-nigh, perhaps wholly, destroy his trade.

But not a word will be found in that case, justifying an active interference with the right of every trader to carry on his business in his own manner, so long as he does not interfere with a similar legal right which is vested in his neighbor and observes the correlative duty pointed out by Sir W. Erle.

My noble friend, the Lord Chancellor, accurately summed up the position of things in the Mogul Case, [1892] A. C. 25, in these words: "What legal right was interfered with? What coercion of the mind, will, or person is effected? All are free to trade on what terms they will, and nothing has been done except in rival trading which could be supposed to interfere with the appellant's interests."

But I will not linger upon a consideration of what may be done in competition, for competition is not even suggested as a justification of the acts now complained of — acts of wanton aggression the outcome of a malicious but successful conspiracy to harm the plaintiff in his trade.

It cannot be — it was not even suggested — that these acts were done in furtherance of any of the lawful objects of the association as set forth in their registered rules, according to the statutory requirements, or in support of any lawful right of the association or any member of it, or to obtain or maintain fair hours of labor or fair wages, or to promote a good understanding between employers and employed and workman and workman, or for the settlement of any

dispute, for none had existence. It would, indeed, be a strange mode of promoting such good understanding to coerce a tradesman's customers to leave him because he would not, at the bidding of the association, dismiss workmen who desired to continue in his service and whom he wished to retain to make way for others he did not want.

I will deal now with the conspiracy part of the claim, respecting which much confusion and uncertainty seems somehow to have arisen, which I find it difficult to understand. I have no intention, however, to embark upon a history of the law relating to the subject, or to the old and obsolete writ of conspiracy. It would be useless for our present purpose.

I will endeavor briefly to state how I view the matter practically, so far as it concerns this case.

A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person. It may be punished criminally by indictment, or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination to carry out an object not in itself unlawful by unlawful means. The essential elements, whether of a criminal or of an actionable conspiracy are, in my opinion, the same, though to sustain an action special damage must be proved. This is the substance of the decision in *Barber v. Lesiter*, 7 C. B. (N. S.) 175. I quote as a very instructive definition of a conspiracy the words of a great lawyer, Willes, J., in *Mulcahy v. Reg.*, (1868), L. R. 3 H. L. at p. 317, in delivering the unanimous opinion of himself, Blackburn, J., Bramwell, B., Keating, J., and Pigott, B., which was adopted by this House: "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means. . . . The number and the compact give weight and cause danger."

It is true these words were uttered touching a criminal case, but they are none the less applicable to conspiracies made the subject of civil actions like the present.

In 1870, Cockburn, C. J., in delivering the unanimous judgment of Channell, B., Cleasby, B., Keating and Brett, J.J., in *Reg. v. Warburton*, L. R. 1 C. C. 276, said: "It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which if done should be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, i. e., amount to a civil wrong."

It has often been debated whether, assuming the existence of a conspiracy to do a wrongful and harmful act towards another and to carry it out by a number of overt acts, no one of which taken singly and alone would, if done by one individual acting alone and apart from any conspiracy, constitute a cause of action, such acts would become unlawful or actionable if done by the conspirators acting jointly or severally in pursuance of their conspiracy, and if by those acts substantial damage was caused to the person against whom the conspiracy was directed: my own opinion is that they would.

In dealing with the question it must be borne in mind that a conspiracy to do harm to another is, from the moment of its formation, unlawful and criminal, though not actionable unless damage is the result.

The overt acts which follow a conspiracy form of themselves no part of the conspiracy: they are only things done to carry out the illicit agreement already formed, and if they are sufficient to accomplish the wrongful object of it, it is immaterial whether singly those acts would have been innocent or wrongful, for they have in their combination brought about the intended mischief, and it is the wilful doing of that mischief, coupled with the resulting damage, which constitutes the cause of action, not of necessity the means by which it was accomplished.

Much consideration of the matter has led me to be convinced that a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may, with conspiracy, become dangerous and alarming, just as a grain of gunpowder is harmless but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine but administered frequently and in larger quantities with a view to harm may be fatal as a poison. Many illustrations of these views might be suggested, but I need them not if I have made myself understood.

The cases bearing upon the subject are not very numerous: the whole subject was fully discussed in the *Mogul Case*, [1892] A. C. 25, in each of its stages—to it I simply refer. *Rex v. Journeymen Tailors of Cambridge*, 8 Geo. I, 8 Mod. 11, was an indictment for a common law conspiracy by workmen to raise wages. On objection taken to the indictment it was upheld for the reason given that the conspiracy was illegal, although the matter about which they conspired might have been lawful for them or any to do if they had not conspired to do it; and *Rex v. Eccles*, 1 Lea. C. C. 274, before Lord Mansfield, was an indictment for a conspiracy by indirect means to deprive and hinder one Booth from using and exercising his trade of a tailor, and in pursuance of that conspiracy hindering and preventing him from following his said trade to his great damage. It was held unnecessary to set out the means by which the intended mischief

was effected, "for the offence does not consist in doing those acts, for they may be perfectly indifferent, but in conspiring with a view to effect the intended mischief by any means. The illegal combination is the gist of the offence." See also per Grose, J., in *R. v. Mawbey*, (1796), 6 T. R. 619; 3 R. R. 282.

If I rightly understand the judgment of Darling, J., in *Huttley v. Simmons*, [1898], 1 Q. B. 181, he treated *Allen v. Flood*, [1898], A. C. 1, as a binding authority compelling him to hold that the object of the conspiracy as proved was not unlawful; in that view he rightly decided that the count for conspiracy could not be maintained. If he had held that, although the object of the conspiracy was unlawful, yet if the overt acts were not so, because they would not have been unlawful if done by one individual without any conspiracy, and had decided on that ground, I should have differed.

I am conscious that I have occupied more of your Lordships' time than I had intended, but the case is of real importance, and I feel that such unlawful conduct as has been pursued towards Mr. Leatham demanded serious attention. I think the law is with him, and that the damages awarded by the jury are under the circumstances very moderate. It is at all times a painful thing for any individual to be the object of the hatred, spite, and ill-will of any one who seeks to do him harm. But that is as nothing compared to the danger and alarm created by a conspiracy formed by a number of unscrupulous enemies acting under an illegal compact, together and separately, as often as opportunity occurs regardless of law, and actuated by malevolence, to injure him and all who stand by him. Such a conspiracy is a powerful and dangerous engine, which in this case has, I think, been employed by the defendants for the perpetration of organized and ruinous oppression.

I think the judgment in the Court below ought to be affirmed and this appeal dismissed with costs.

LORD LINDLEY. My Lords, the case of *Allen v. Flood*, [1898] A. C. 1, has so important a bearing on the present appeal that it is necessary to ascertain exactly what this House really decided in that celebrated case. It was an action by two workmen of an iron company against three members of a trade union, namely, Allen and two others, for maliciously, wrongfully, and with intent to injure the plaintiffs, procuring and inducing the iron company to discharge the plaintiffs. [1895] 2 Q. B. 22, 23; [1898] A. C. 3. The action was tried before Kennedy, J., who ruled that there was no evidence to go to the jury of conspiracy, intimidation, coercion, or breach of contract. The result of the trial was that the plaintiffs obtained a verdict and judgment against Allen alone. He appealed, and the only question which this House had to determine was whether what he had done entitled the plaintiffs to maintain their action against him. What the jury found that he had done was, that he had maliciously in-

duced the employers of the plaintiffs to discharge them, whereby the plaintiffs suffered damage. Different views were taken by the noble Lords who heard the appeal as to Allen's authority to call out the members of the union, and also as to the means used by Allen to induce the employers of the plaintiffs to discharge them; but, in the opinion of the noble Lords who formed the majority of your Lordship's House, all that Allen did was to inform the employers of the plaintiffs that most of their workmen would leave them if they did not discharge the plaintiffs. [1898] A. C. p. 19, Lord Watson; p. 115, Lord Herschell; pp. 147-150, Lord Macnaghten; pp. 161, 165, Lord Shand; p. 175, Lord Davey; p. 178, Lord James. There being no question of conspiracy, intimidation, coercion, or breach of contract for consideration by the House, and the majority of their Lordships having come to the conclusion that Allen had done no more than I have stated, the majority of the noble Lords held that the action against Allen would not lie; that he had infringed no right of the plaintiffs; that he had done nothing which he had no legal right to do, and that the fact that he had acted maliciously and with intent to injure the plaintiffs did not, without more, entitle the plaintiffs to maintain the action.

My Lords, this decision, as I understand it, establishes two propositions: one a far-reaching and extremely important proposition of law, and the other a comparatively unimportant proposition of mixed law and fact, useful as a guide, but of a very different character from the first.

The first and important proposition is that an act otherwise lawful, although harmful, does not become actionable by being done maliciously in the sense of proceeding from a bad motive, and with intent to annoy or harm another. This is a legal doctrine not new or laid down for the first time, in *Allen v. Flood*, [1898] A. C. 1; it had been gaining ground for some time, but it was never before so fully and authoritatively expounded as in that case. In applying this proposition care, however, must be taken to bear in mind, first, that in *Allen v. Flood*, [1898] A. C. 1, criminal responsibility had not to be considered. It would revolutionize criminal law to say that the criminal responsibility for conduct never depends on intention. Secondly, it must be borne in mind that even in considering a person's liability to civil proceedings the proposition in question only applies to "acts otherwise lawful," i. e., to acts involving no breach of duty, or, in other words, no wrong to any one. I shall refer to this matter later on.

The second proposition is that what Allen did infringed no right of the plaintiffs, even although he acted maliciously and with a view to injure them. I have already stated what he did, and all that he did, in the opinion of the majority of the noble Lords. If their view of the facts was correct, their conclusion that Allen infringed no

right of the plaintiffs is perfectly intelligible and indeed unavoidable. Truly, to inform a person that others will annoy or injure him unless he acts in a particular way cannot of itself be actionable, whatever the motive or intention of the informant may have been.

My Lords, the questions whether Allen had more power over the men than some of their Lordships thought, and whether Allen did more than they thought, are mere questions of fact. Neither of these questions is a question of law, and no Court or jury is bound as a matter of law to draw from the facts before it inferences of fact similar to those drawn by noble Lords from the evidence relating to Allen in the case before them.

I will pass now to the facts of this case, and consider (1) what the plaintiff's rights were; (2) what the defendants' conduct was; (3) whether that conduct infringed the plaintiff's rights. For the sake of clearness it will be convenient to consider these questions in the first place apart from the statute which legalizes strikes, and in the next place with reference to that statute.

1. As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact — in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified — the whole aspect of the case is changed; the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances. The cases collected in the old books on actions on the case, and the illustrations given by the late Bowen, L. J., in his admirable judgment in the *Mogul Steamship Company's Case*, 23 Q. B. D. 613, 614, may be

referred to in support of the foregoing conclusion, and I do not understand the decision in *Allen v. Flood*, [1898] A. C. 1, to be opposed to it.

If the above reasoning is correct, *Lumley v. Gye*, 2 E. & B. 216,¹ was rightly decided, as I am of opinion it clearly was. Further, the principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him. *Temperton v. Russell*, [1893] 1 Q. B. 715, ought to have been decided and may be upheld on this principle. That case was much criticized in *Allen v. Flood*, [1898] A. C. 1, and not without reason; for, according to the judgment of Lord Esher, the defendants' liability depended on motive or intention alone, whether anything wrong was done or not. This went too far, as was pointed out in *Allen v. Flood*, [1898] A. C. 1. But in *Temperton v. Russell*, [1893] 1 Q. B. 715, there was a wrongful act, namely, conspiracy and unjustifiable interference with Brentano, who dealt with the plaintiff. This wrongful act warranted the decision, which I think was right.

2. I pass on to consider what the defendants did. The appellant and two of the other defendants were the officers of a trade union, and the jury have found that the defendants wrongfully and maliciously induced the customers of the plaintiff to refuse to deal with him, and maliciously conspired to induce them not to deal with him. There were similar findings as to inducing servants of the plaintiff to leave him. What the defendants did was to threaten to call out the union workmen of the plaintiff and of his customers if he would not discharge some non-union men in his employ. In other words, in order to compel the plaintiff to discharge some of his men, the defendants threatened to put the plaintiff and his customers, and persons lawfully working for them, to all the inconvenience they could without using violence. The defendants' conduct was the more reprehensible because the plaintiff offered to pay the fees necessary to enable his non-union men to become members of the defendants' union; but this would not satisfy the defendants. The facts of this case are entirely different from those which this House had to consider in *Allen v. Flood*, [1898] A. C. 1. In the present case there was no dispute between the plaintiff and his men. None of them wanted to leave his employ. Nor was there any dispute between the plaintiff's customers and their own men, nor between the plaintiff and his customers, nor between the men they respectively employed. The defendants called no witnesses, and there was no evidence to justify or excuse the conduct of the defendants. That they acted as they did in furtherance of what they considered the interests of union men

¹ Ante, p. 346.

may probably be fairly assumed in their favor, although they did not come forward and say so themselves; but that is all that can be said for them. No one can, I think, say that the verdict was not amply warranted by the evidence. I have purposely said nothing about the black list, as the learned judge who tried the case considered that the evidence did not connect the appellant with that list. But the black list was, in my opinion, a very important feature in that case.

3. The remaining question is whether such conduct infringed the plaintiff's rights so as to give him a cause of action. In my opinion, it plainly did. The defendants were doing a great deal more than exercising their own rights: they were dictating to the plaintiff and his customers and servants what they were to do. The defendants were violating their duty to the plaintiff and his customers and servants, which was to leave them in the undisturbed enjoyment of their liberty of action as already explained. What is the legal justification or excuse for such conduct? None is alleged, and none can be found. This violation of duty by the defendants resulted in damage to the plaintiff—not remote, but immediate and intended. The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage. Your Lordships have to deal with a case, not of *damnum absque injuria*, but of *damnum cum injuria*.

Every element necessary to give a cause of action on ordinary principles of law is present in this case. As regards authorities, they were all exhaustively examined in the *Mogul Steamship Co. v. MacGregor*, [1892] A. C. 25, and *Allen v. Flood*, [1898] A. C. 1, and it is unnecessary to dwell upon them again. I have examined all those which are important, and I venture to say that there is not a single decision anterior to *Allen v. Flood*, [1898] A. C. 1, in favor of the appellant. His sheet-anchor is *Allen v. Flood*, [1898] A. C. 1, which is far from covering this case, and which can only be made to cover it by greatly extending its operation.

It was contended at the bar that if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert makes no difference. My Lords, one man without others behind him who would obey his orders could not have done what these defendants did. One man exercising the same control over others as these defendants had could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action. I am aware that in *Allen v. Flood*, 1898 A. C. 1, Lord Herschell, [1898] A. C. at pp. 128, 139, expressed his opinion to be that it was immaterial whether Allen said he would call the men out or not. This may have been so in that particular case, as there was evidence that Allen had no power to call out the men, and the men had

determined to strike before Allen had anything to do with the matter. But if Lord Herschell meant to say that as a matter of law there is no difference between giving information that men will strike and making them strike, or threatening to make them strike, by calling them out when they do not want to strike, I am unable to concur with him. It is all very well to talk about peaceable persuasion. It may be that in *Allen v. Flood*, [1898] A. C. 1, there was nothing more; but here there was very much more. What may begin as peaceable persuasion may easily become, and in trades union disputes generally does become, peremptory ordering, with threats open or covert of very unpleasant consequences to those who are not persuaded. Calling workmen out involves very serious consequences to such of them as do not obey. Black lists are real instruments of coercion, as every man whose name is on one soon discovers to his cost. A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do is a very different thing, and is *prima facie* unlawful. Again, not to work oneself is lawful so long as one keeps off the poor-rates, but to order men not to work when they are willing to work is another thing. A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist, and, to say the least, requiring justification. None was offered in this case.

My Lords, it is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce. I am aware of the difficulties which surround the law of conspiracy both in its criminal and civil aspects; and older views have been greatly and, if I may say so, most beneficially modified by the discussions and decisions in America and this country. Amongst the American cases I would refer especially to *Vegeahn v. Gunter*, 167 Mass. 92, where coercion by other means than violence, or threats of it, was held unlawful. In this country it is now settled by the decision of this house in the case of the *Mogul Steamship Co.*, [1892] A. C. 25; ¹ 23 Q. B. D. 598, that no action for a conspiracy lies against persons who act in concert to damage another and do damage him, but who at the same time merely exercise their own rights and who infringe no rights of other people. *Allen v. Flood*, [1898] A. C. 1, emphasizes the same doctrine. The principle was strikingly illustrated in the *Scottish Co-operative Society v. Glasgow Fleshers' Association*, 35 Sc. L. R. 645, which was referred to in the course of the argument.

¹ Ante, p. 346.

In this case some butchers induced some salesmen not to sell meat to the plaintiffs. The means employed were to threaten the salesmen that if they continued to sell meat to the plaintiffs they, the butchers, would not buy from the salesmen. There was nothing unlawful in this, and the learned judge held that the plaintiffs showed no cause of action, although the butchers' object was to prevent the plaintiffs from buying for co-operative societies in competition with themselves, and the defendants were acting in concert.

The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the plaintiffs, no one's right was infringed — no wrongful act was committed; whilst in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infringement of their liberty as well as his, and was wrongful both to them and also to him, as I have already endeavored to show.

Intentional damage which arises from the mere exercise of the rights of many is not, I apprehend, actionable by our law as now settled. To hold the contrary would be unduly to restrict the liberty of one set of persons in order to uphold the liberty of another set. According to our law, competition, with all its drawbacks, not only between individuals but between associations, and between them and individuals, is permissible, provided nobody's rights are infringed. The law is the same for all persons, whatever their callings; it applies to masters as well as to men; the proviso, however, is all-important, and it also applies to both and limits the rights of those who combine to lock-out as well as the right of those who strike. But coercion by threats, open or disguised, not only of bodily harm but of serious annoyance and damage, is *prima facie*, at all events, a wrong inflicted on the persons coerced; and in considering whether coercion has been applied or not, numbers cannot be disregarded.

My Lords, the appellant relied on several authorities besides those already referred to, which I will shortly notice. No coercion of the plaintiff's employer, customers, servants, or friends had to be considered in *Kearney v. Lloyd*, 26 L. R. Ir. 268. This is fully shown in the various judgments now under review.

In *Huttley v. Simmons*, [1898] 1 Q. B. 181, the plaintiff was a cab-driver in the employ of a cab-owner. The defendants were four members of a trade union who were alleged to have maliciously induced the cab-owner not to employ the plaintiff, and not to let him have a cab to drive. The report does not state the means employed to induce the cab-owner to refuse to have any dealings with the plaintiff. The learned judge who tried the case held that as to three of the defendants the plaintiff had no case, and that as to the fourth, against whom the jury found a verdict, no action would lie because he had done nothing in itself wrong, apart from motive, and that the fact that he acted in concert with others made no difference. It is difficult

to draw any satisfactory conclusion from this case, as the most material facts are not stated.

I conclude this part of the case by saying that, in my opinion, the direction given to the jury by the learned judge who tried the case was correct, so far as the liability of the defendants turns on principles of common law, and that the objection taken to it by the counsel for the appellant is untenable. I mean the objection that the learned judge did not distinguish between coercion to break contracts of service, and coercion to break contracts of other kinds, and coercion not to enter into contracts.

I pass now to consider the effect of the statute 38 & 39 Viet. c. 86. This Act clearly recognizes the legality of strikes and lock-outs up to a certain point. It is plainly legal now for workmen to combine not to work except on their own terms. On the other hand, it is clearly illegal for them or any one else to use force or threats of violence to prevent other people from working on any terms which they think proper. But there are many ways short of violence, or the threat of it, of compelling persons to act in a way which they do not like. There are annoyances of all sorts and degrees: picketing is a distinct annoyance and if damage results is an actionable nuisance at common law, but if confined merely to obtaining or communicating information it is rendered lawful by the Act (s. 7). Is a combination to annoy a person's customers, so as to compel them to leave him unless he obeys the combination, permitted by the Act or not? It is not forbidden by s. 7; is it permitted by s. 3? I cannot think that it is. The Court of Appeal (of which I was a member) so decided in *Lyons v. Wilkins*, [1896] 1 Ch. 811, in the case of *Schoenthal*, which arose there, and is referred to in the judgment of Walker, L. J., at p. 99 of the printed judgments in this case. This particular point had not to be reconsidered when *Lyons v. Wilkins*, [1896] 1 Ch. 811, came before the Court of Appeal after the decision in *Allen v. Flood*. See [1899], 1 Ch. 255. But Byrne, J., modified the injunction granted on the first occasion, see [1899] 1 Ch. at pp. 258, 259, by confining it to watching and besetting. He might safely have gone further and have restrained the use of other unlawful means; but the strike was then over, and his modification was not objected to, and cannot be regarded as an authority in favor of the appellant's contention.

It must be conceded that if what the defendant here did had been done by one person it would not have been punishable as a crime. I cannot myself see that there was in this case any trade dispute between employers and workmen within the meaning of s. 3. I am not at present prepared to say that the officers of a trade union who create strife by calling out members of the union working for an employer with whom none of them have any dispute can invoke the benefit of this section even on an indictment for a conspiracy.

But assuming that there was a trade dispute within the meaning of s. 3, and that an indictment for conspiracy could not be sustained in a case like this, the difference between an indictment for a conspiracy and an action for damages occasioned by a conspiracy is very marked and is well known. An illegal agreement, whether carried out or not, is the essential element in a criminal case; the damage done by several persons acting in concert, and not the criminal conspiracy, is the important element in the action for damages, see 1 Wm. Saund. 229 b. 230, and *Barber v. Lesiter*, 7 C. B. (N. S.) 175. In my opinion, it is quite clear that s. 3 has no application to civil actions: it is confined entirely to criminal proceedings. Nor can I agree with those who say that the civil liability depends on the criminality and that if such conduct as is complained of has ceased to be criminal it has therefore ceased to be actionable. On this point I will content myself by saying that I agree with Andrews, J., and those who concurred with him. It does not follow, and it is not true, that annoyances which are not indictable are not actionable. The law relating to nuisances, to say nothing of the law relating to combinations, shows that many annoyances are actionable which are not indictable, and the principles of justice on which this is held to be so appear to me to apply to such cases as these.

My Lords, I will detain your Lordships no longer. *Allen v. Flood*, [1898] A. C. 1, is in many respects a very valuable decision, but it may be easily misunderstood and carried too far.

Your Lordships are asked to extend it and to destroy that individual liberty which our laws so anxiously guard. The appellant seeks by means of *Allen v. Flood*, [1898] A. C. 1, and by logical reasoning based upon some passages in the judgments given by the noble Lords who decided it, to drive your Lordships to hold that boycotting by trades unions in one of its most objectionable forms is lawful, and gives no cause of action to its victims although they may be pecuniarily ruined thereby.

My Lords, so to hold would, in my opinion, be contrary to well-settled principles of English law, and would be to do what is not yet authorized by any statute or legal decision.

In my opinion this appeal ought to be dismissed with costs.

Order appealed from affirmed and appeal dismissed with costs.
[The Earl of Halsbury, L. C., and Lord Shand delivered concurring opinions.]

PICKETT *v.* WALSH.

Supreme Court of Massachusetts, October, 1906. 192 Mass. 572.

THE case is stated in the opinion.

LORING, J. This suit in equity comes before us on an appeal from a final decree, where the evidence was taken by a commissioner and where no findings of fact were made in the lower court.

The bill was brought to enjoin the defendants from combining and conspiring to interfere with the plaintiffs in pursuing their trade of brick and stone pointers. The purpose of the bill as stated in the prayers for relief was to enjoin the defendants (1) from combining and conspiring in any way to compel L. P. Soule and Son Company, or any other person, firm or corporation by force, threats, intimidation or coercion, to discharge the complainants in the bill of complaint, to wit: Robert H. Pickett, Charles A. Pickett, Thomas J. Lally and Walter H. Wilkins, or to refrain from further employing them in and about their trade and occupation; (2) from combining and conspiring to compel the owners of the so-called Ford Building on Ashburton Place in the city of Boston to break or decline to carry out their said contract with the complainant Robert H. Pickett; and (3) from combining and conspiring to interfere with the said complainants, or any of them, in the practice of their trade and occupation, or to prevent them from obtaining further employment thereat.

The defendants were the officers of two unincorporated bricklayers' unions, to wit, Unions No. 3 and No. 27, and of one stone masons' union, to wit, Union No. 9. The plaintiffs also undertook to make each one of the three unincorporated unions parties defendant. The Bricklayers' Union No. 27 seems from the evidence not to have been concerned in the matters in dispute. For this reason we shall not refer to it again except to show later on that there is no evidence that it took part in the matters here in question. The individual defendants were one Driscoll, the walking delegate of the Bricklayers' Union No. 3, one Walsh, the walking delegate of the Stone Masons' Union No. 9, and other persons who were officers of those two unions.

It appears from the evidence that the trade of brick and stone pointing is a trade which, in the neighborhood of the city of Boston at any rate, has been carried on to some extent as a separate trade for nearly if not quite one hundred years. It further appears that there are now some forty-five men engaged in that trade in the vicinity of that city.

The trade of a brick or a stone pointer consists in going over a building (generally when it is first erected) to clean it and to put a finish on the mortar of the joints. Apparently in the city of

Worcester, and to some extent in the city of Boston, this work of pointing is done by bricklayers and stone masons.

The dispute which gave rise to the suit now before us had its origin in a set of rules adopted in January, 1905, by the Bricklayers' and Masons' International Union of America, to which the two unions here in question were subordinate. This set of rules contained a provision that bricklaying masonry should consist (*inter alia*) of "all pointing and cleaning brick walls," and that stone masonry should consist (*inter alia*) of the "cleaning and pointing of stone work." The practical working of the principles of brick and stone masonry as defined in these rules was left to the subordinate unions.

By the Constitution, By-Laws and Rules of Order of the Bricklayers' Union No. 3, it is provided that members shall not accept employment "where a difficulty exists in consequence of questions involving the rules which govern the Union," and that any member violating a law of the union shall on conviction "be reprimanded, suspended or fined at the discretion of the Union." No similar provision appears in the extract from the Constitution of the Stone Masons' Union which was in evidence, but it is not a violent assumption from the action of the masons and from the testimony of Walsh, the walking delegate of the Stone Masons' Union, that the members of the Masons' Union stood on the same footing as the members of the Bricklayers' Union in this respect.

In other words, the make-up of the two unions was such that any member of a subordinate union (which had adopted a working rule containing in substance the provisions of the working rules of the International Union as to cleaning and pointing buildings) who continued to work on a job on which a pointer was at work was liable to be reprimanded, fined or suspended.

This brings us to the action taken by the unions here in question.

There was an executive committee of the two unions. On July 28, 1905, this executive committee voted "that beginning September 18, 1905, no member of the Bricklayers' and Masons' unions of Boston and vicinity, will work on any building where the contractor will not agree to have the pointing done by bricklayers or masons."

This action of the executive committee was formally adopted by the Bricklayers' Union No. 3, and seems to have been informally adopted by the Stone Masons' Union No. 9. In pursuance thereof the following circular letter was issued: "The Bricklayers' and Masons' Unions of Boston and vicinity have voted that no bricklayer or mason will work for any firm or contractor who will not employ bricklayers or masons to do the pointing of brick, terra cotta and stone masonry. This action to go into effect September 18, 1905."

In September, 1905, L. D. Willcutt and Son as general contractors were erecting (among other buildings) a stone building on the corner of Massachusetts Avenue and Boylston Street in Boston. On the

eighteenth day of that month, Mr. L. D. Willcutt of that firm was notified that if he did not discharge the pointers who were working for his firm in pointing that building all the masons and bricklayers working for his firm on other buildings in Boston (all of whom were union men) would strike. Thereupon he suspended the work which was being done by the pointers on the building on the corner of Massachusetts Avenue and Boylston Street. This evidence was admitted to show that there was a general scheme that where pointing was given to any one beside union bricklayers and stone masons there would be a strike.

On November 13, 1905, the defendant Walsh, the walking delegate of the Stone Masons' Union No. 9, and the defendant Driscoll, the walking delegate of the Bricklayers' Union No. 3, came to the Ford Building, for which the corporation of L. P. Soule and Son Company were the general contractors, and found that the cleaning and the pointing of that building were being done under a contract between the owners of the building and Robert H. Pickett, one of the plaintiffs here. They then went to a brick building which was being erected by the L. P. Soule and Son Company as contractors, a cold storage warehouse on Eastern Avenue, and there Driscoll notified the men that the pointing at the Ford Building was being done by pointers. In consequence all the bricklayers employed by the L. P. Soule and Son Company on the cold storage building, fifty in all, being union men, struck work on that or the next day. The next day, November 14, Walsh went to a stone building which was being erected by the same corporation for the International Trust Company on the corner of Arch Street and Devonshire Street, and told the workmen there of the pointing on the Ford Building; whereupon all the stone masons working there, five or six in all, being union men, struck work.

This bill was filed in the Superior Court on November 21, 1905. It seems to have come on for hearing on December 5, 1905. As we have said, the evidence was taken by a commissioner, a final decree in favor of the plaintiffs on all three grounds was made on December 11, without any special findings of fact, and the case is here on appeal from that decree.

It appeared from the testimony of Parker F. Soule (an officer of the L. P. Soule and Son Company) that it was cheaper to make a contract with pointers for the work of pointing and cleaning than to employ stone masons and bricklayers to do that work. It appeared from other evidence that the wages of a bricklayer or stone mason were fifty-five cents an hour, while pointers are paid three dollars for a day of eight hours, or thirty-seven and one-half cents an hour. It further appeared from Mr. Soule's testimony that he preferred to give the work to the pointers because in cleaning a building acid has to be used, and, if the acid is used to excess, stains are caused which in some instances it is impossible to "get out;" and that he did not

think that the bricklayers and stone masons were competent to use these acids. He also preferred to give the work to the pointers because the work which is done by the pointers usually is done by contract, in which case the general contractor who employs the pointers is relieved from responsibility on account of accidents which may occur because of the fact that the work is done on a swinging stage, at times at great heights. Again it appeared from the evidence that L. P. Soule and Son Company were not the only contractors who thought that they got better work at a smaller cost and with less liability by making a contract with stone pointers for the doing of this work than by employing stone masons and bricklayers to do it.

All this was explained to the walking delegate of the Bricklayers' Union here in question at an interview between Mr. Soule and the walking delegate of that union held within two days of the strike. It also appeared that at that interview the delegate told Mr. Soule that, while it had been against the rules of the union that any member should take piece work, the taking of piece work recently had been allowed; whereupon Mr. Soule told him that "if he had any members of his union who were reliable men, whom we could have confidence enough in to let a contract to, who would give prices as low, . . . he would have no trouble in getting all the stone pointing there was going." No offer to make a contract on these terms was made, and on the evidence it must be assumed that there was nothing in this statement of the defendant Walsh.

It further appeared from the evidence that the brick and stone pointers of Boston applied to the Building Trades Council for a charter. It is stated in the record of the Brick Masons' Union No. 3, that "the said pointers about a year ago applied to the A. F. of L. for a charter, which was denied them, the American Federation of Labor taking the stand that brick and stone pointing was a part of the bricklayers' and masons' trade." On September 11, 1905, the Brick Masons' Union No. 3 voted to "file a protest to the B. T. C. against their granting a charter to the brick and stone pointers of Boston," and on September 18 it was voted "that this Committee [sic] send communication to B. T. C. requesting that body not to grant a charter to the so-called brick and stone pointers." It was admitted that the men engaged in the business of brick and stone pointers were not qualified for the business of bricklayers and stone masons.

There was evidence that at the interview between Driscoll and Mr. Willcutt, Mr. Willcutt told Driscoll that he did not believe that, when there were twelve hundred men in the union and thirty pointers outside, all this fuss was being made to get the pointers' work for the union men; that he thought it was "simply a question of dictation to us;" and on Mr. Willcutt's asking him (Driscoll) "Do you really want it or do you want to drive the men out of business?" Driscoll smiled and said: "That is a charitable way of looking at it."

There seem to be three causes of action upheld by the decree.

In the first place, Robert H. Pickett, one of the plaintiffs, had a contract with the owners of the Ford Building and was at work under it when the defendants struck. He seeks protection from a strike on L. P. Soule and Son Company to force the owners of the Ford Building to give this work to the unions and to take it away from him. Except for the fact of this contract, in which the plaintiff Robert H. Pickett alone was concerned, the first and second causes of action are alike.

The second cause of action consists in the effort of all the plaintiffs to be protected from being discharged or not employed by the L. P. Soule and Son Company because the defendants struck work for that corporation so long as that corporation worked on a building on which Robert H. Pickett was employed by the owners of that building.

Finally, the plaintiffs sought to be protected against a strike by the defendants in order to get the work of pointing for the members of their unions.

No objection has been taken to the bill on the ground of multifariousness. We therefore shall consider all three causes of action.

We will consider first the last of the three causes of action.

The question, so far as this the third cause of action goes (apart from a question of fact which we will deal with later on), is whether the defendant unions have a right to strike for the purpose for which they struck; or, to put it more accurately and more narrowly, it is this: Is a union of bricklayers and stone masons justified in striking to force a contractor to employ them by the day to do cleaning and pointing at higher wages than pointers are paid, where the contractors wish to make contracts with the pointers for such work to be done by the piece because they think they get better work at less cost with no liability for accidents, and where the pointers wish to make contracts for that work with the contractors on terms satisfactory to them?

In other words, we have to deal with one of the great and pressing questions growing out of the existence of the powerful combinations, sometimes of capital and sometimes of labor, which have been instituted in recent years where their actions come into conflict with the interests of individuals. The combination in the case at bar is a combination of workmen, and the conflict is between a labor union on the one hand and several unorganized laborers on the other hand.

It is only in recent years that these great and powerful combinations have made their appearance, and the limits to which they may go in enforcing their demands are far from being settled.

It is settled however that laborers have a right to organize as labor unions to promote their welfare.

Further, there is no question of the general right of a labor union to strike.

On the other hand it is settled that some strikes by labor unions are illegal. It was held in *Carew v. Rutherford*, 106 Mass. 1, that a strike by the members of a labor union was illegal when set on foot to force their employer to pay a fine imposed upon him by the union of which he was not a member, for not giving the union all his work. To the same effect see *March v. Bricklayers' & Plasterers' Union No. 1*, 79 Conn. 7. Again, it was held in *Plant v. Woods*, 176 Mass. 492, that a labor union could not force other workmen to join it by refusing to work if workmen were employed who were not members of that union. To the same effect see *Erdman v. Mitchell*, 207 Penn. St. 79; *O'Brien v. People*, 216 Ill. 354; *Loewe v. California State Federation of Labor*, 139 Fed. Rep. 71. And see in this connection *Giblan v. National Amalgamated Labourers' Union*, [1903] 2 K. B. 600.

When and for what end this power of coercion and compulsion commonly known as a strike may be legally used is the question which this case calls upon us to decide. In the present state of the authorities it becomes necessary to consider the general principles governing labor unions and strikes by labor unions.

The right of laborers to organize unions and to utilize such organizations by instituting a strike is an exercise of the common law right of every citizen to pursue his calling, whether of labor or business, as he in his judgment thinks fit. It is pointed out in *Carew v. Rutherford*, 106 Mass. 1, 14, that in the earlier days of the colony the government undertook to control the conduct of labor and business to some extent, but that later this policy of regulation was abandoned and all citizens were left free to pursue their calling, whether of labor or business, as seemed to them best. This common law right was raised to the dignity of a constitutional right by being incorporated in the Constitution of the Commonwealth. So far as the question now before us goes it is of no consequence whether the right to pursue one's calling (whether it be of labor or of business) is a common law right or a constitutional right, since the violation of it here complained of is on the part of individuals and not on the part of the Legislature. What is of consequence here is that such a right exists. In article 1 of the Declaration of Rights it is declared that "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of . . . acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." It is in the exercise of this right that laborers can legally combine together in what are called labor unions.

This right of one or more citizens to pursue his or their calling as he or they see fit is limited by the existence of the same right in all other citizens. The right and the result are accurately stated by Sir William Erle in his book on Trade Unions in these words: "Every person has a right under the law, as between him and his fellow sub-

jects, to full freedom in disposing of his own labor or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others:" cited by this court in *Plant v. Woods*, 176 Mass. 492, 498.

We now have arrived at the point where a labor union, being an organization brought about by the exercise on the part of its members of the right of every citizen to pursue his calling as he thinks best, is limited in what it can do by the existence of the same right in each and every other citizen to pursue his and their calling as he or they think best.

In addition to the limitation thus put on labor unions there is a fact which puts a further limitation on what acts a labor union can legally do. That is the increase of power which a combination of citizens has over the individual citizen. Take for example the power of a labor union to compel by a strike compliance with its demands. Speaking generally a strike to be successful means not only coercion and compulsion but coercion and compulsion which, for practical purposes, are irresistible. A successful strike by laborers means, in many if not in most cases, that for practical purposes the strikers have such a control of the labor which the employer must have that he has to yield to their demands. A single individual may well be left to take his chances in a struggle with another individual. But in a struggle with a number of persons combined together to fight an individual the individual's chance is small, if it exists at all. It is plain that a strike by a combination of persons has a power of coercion which an individual does not have.

The result of this greater power of coercion on the part of a combination of individuals is that what is lawful for an individual is not the test of what is lawful for a combination of individuals; or to state it in another way, there are things which it is lawful for an individual to do which it is not lawful for a combination of individuals to do. Take for example the example put in *Allen v. Flood*, [1898] A. C. 1, 165, of a butler refusing to renew a contract of service because the cook was personally distasteful to him, whereupon, in order to secure the services of the butler, the master refrains from re-engaging the cook whose term of service also had expired. We have no doubt that it is within the legal rights of a single person to refuse to work with another for the reason that the other person is distasteful to him, or for any other reason however arbitrary. But it is established in this Commonwealth that it is not legal (even where he wishes to do so) for an employer to agree with a union to discharge a non-union workman for an arbitrary cause at the request of the union. *Berry v. Donovan*, 188 Mass. 353. A fortiori the members of a labor union cannot by a strike refuse to work with another workman for

an arbitrary cause. For the general proposition that what is lawful for an individual is not necessarily lawful for a combination of individuals see *Quinn v. Leathem*, [1901] A. C. 495, 511;¹ *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, 616; S. C. on appeal, [1892] A. C. 25, 45;² *Gregory v. Brunswick*, 6 M. & G. 205; S. C. on appeal, 3 C. B. 481. It is in effect concluded by *Plant v. Woods*, 176 Mass. 492.

These being the general principles, we are brought to the question of the legality of the strike in the case at bar, namely, a strike of bricklayers and masons to get the work of pointing, or, to put it more accurately, a combination by the defendants, who are bricklayers and masons, to refuse to lay bricks and stone where the pointing of them is given to others. The defendants in effect say we want the work of pointing the bricks and stone laid by us, and you must give us all or none of the work.

The case is one of competition between the defendant unions and the individual plaintiffs for the work of pointing. The work of pointing for which these two sets of workmen are competing is work which the contractors are obliged to have. One peculiarity of the case therefore is that the fight here is necessarily a triangular one. It necessarily involves the two sets of competing workmen and the contractor, and is not confined to the two parties to the contract, as is the case where workmen strike to get better wages from their employer or other conditions which are better for them. In this respect the case is like *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598; S. C. on appeal, [1892], A. C. 25.

The right which the defendant unions claim to exercise in carrying their point in the course of this competition is a trade advantage, namely, that they have labor which the contractors want, or, if you please, cannot get elsewhere; and they insist upon using this trade advantage to get additional work, namely, the work of pointing the bricks and stone which they lay. It is somewhat like the advantage which the owner of back land has when he has bought the front lot. He is not bound to sell them separately. To be sure the right of an individual owner to sell both or none is not decisive of the right of a labor union to combine to refuse to lay bricks or stone unless they are given the job of pointing the bricks laid by them. There are things which an individual can do which a combination of individuals cannot do. But having regard to the right on which the defendants' organization as a labor union rests, the correlative duty owed by it to others, and the limitation of the defendants' rights coming from the increased power of organization, we are of opinion that it was within the rights of these unions to compete for the work of doing the pointing and, in the exercise of their right of competition, to refuse to lay bricks and set stone unless they were given the work of pointing

¹ Ante, p. 362.

² Ante, p. 346.

them when laid. See in this connection *Plant v. Woods*, 176 Mass. 492, 502; *Berry v. Donovan*, 188 Mass. 353, 357.

The result to which that conclusion brings us in the case at bar ought not to be passed by without consideration.

The result is harsh on the contractors, who prefer to give the work to the pointers because (1) the pointers do it by contract (in which case the contractors escape the liability incident to the relation of employer and employee); because (2) the contractors think that the pointers do the work better, and if not well done the buildings may be permanently injured by acid; and finally (3) because they get from the pointers better work with less liability at a smaller cost. Again, so far as the pointers (who cannot lay brick or stone) are concerned, the result is disastrous. But all that the labor unions have done is to say you must employ us for all the work or none of it. They have not said that if you employ the pointers you must pay us a fine, as they did in *Carew v. Rutherford*, 106 Mass. 1. They have not undertaken to forbid the contractors employing pointers, as they did in *Plant v. Woods*, 176 Mass. 492. So far as the labor unions are concerned the contractors can employ pointers if they choose, but if the contractors choose to give the work of pointing the bricks and stones to others the unions take the stand that the contractors will have to get some one else to lay them. The effect of this in the case at bar appears to be that the contractors are forced against their will to give the work of pointing to the masons and bricklayers. But the fact that the contractors are forced to do what they do not want to do is not decisive of the legality of the labor union's acts. That is true wherever a strike is successful. The contractors doubtless would have liked it better if there had been no competition between the bricklayers' and masons' unions on the one hand and the individual pointers on the other hand. But there is competition. There being competition, they prefer the course they have taken. They prefer to give all the work to the unions rather than get non-union men to lay bricks and stone to be pointed by the plaintiffs.

Further, the effect of complying with the labor unions' demands apparently will be the destruction of the plaintiffs' business. But the fact that the business of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the illegality of the acts. It was well said by Hammond, J., in *Martell v. White*, 185 Mass. 255, 260, in regard to the right of a citizen to pursue his business without interference by a combination to destroy it: "Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly."

We cannot say on the evidence that pointing is something foreign

to the work of a bricklayer or a stone mason and therefore something which a union of bricklayers and stone masons have no right to compete for or insist upon, and so bring the case within *Carew v. Rutherford*, 106 Mass. 1; *March v. Bricklayers & Plasterers Union No. 1*, 79 Conn. 7; and *Giblan v. National Amalgamated Labourers' Union*, [1903], 2 K. B. 600. On the contrary the evidence shows that in Boston the pointing is done to some extent by bricklayers and stone masons, and there is no evidence that the trade of pointiers exists outside that city.

The protest of the defendant unions against the plaintiffs being allowed to organize a pointiers' union is not an act of oppression. It is not like the refusal of the union in *Quinn v. Leathem*, [1901], A. C. 495, to work with the non-union men or to admit the non-union men to their union. The defendants' unions are not shown to be unwilling to admit the plaintiffs to membership if they are qualified as bricklayers or stone masons. But the difficulty is that the plaintiffs are not so qualified. They are not bricklayers or masons. The unions have a right to determine what kind of workmen shall compose the union, and to insist that pointing shall not be a separate trade so far as union work is concerned. They have not undertaken to say that the contractors shall not treat the two trades as distinct. What they insist upon is that if the contractors employ them they shall employ them to do both kinds of work.

The application of the right of the defendant unions, who are composed of bricklayers and stone masons, to compete with the individual plaintiffs, who can do nothing but pointing (as we have said), is in the case at bar disastrous to the pointiers and hard on the contractors. But this is not the first case where the exercise of the right of competition ends in such a result. The case at bar is an instance where the evils which are or may be incident to competition bear very harshly on those interested, but in spite of such evils competition is necessary to the welfare of the community.

So far as previous decisions go the case which comes nearest to the case at bar in the kind of question raised is that of *Allen v. Flood*, [1898], A. C. 1. In that case there was a dispute between shipwrights and boiler makers as to iron work in shipbuilding. It was stated by some of the judges (see for example Lord Watson at p. 99; Lord Herschell at p. 129; Lord Macnaghten at p. 151) that it was lawful for either to strike to get this work from the other. But the decision in *Allen v. Flood* went off on another ground. See Lord Halsbury, Ch., in *Quinn v. Leathem*, [1901], A. C. 495.

The defendants have urged upon us the case of *Bowen v. Matheson*, 14 Allen, 499. But although so far as the third cause of action here in question is concerned we have reached the result arrived at in that case, we have reached it on other grounds. That case went up on demurrer and the ground on which that case was decided was that

on the allegations in the declaration it was to be treated as one of the class of cases of which *Parker v. Huntington*, 2 Gray, 124, is the leading case in this Commonwealth, and *Bilafsky v. Conveyancers Title Ins. Co.*, 192 Mass. 504, is the last, namely, cases in which the allegations of conspiracy are not allegations of a tortious act in and of themselves, but are simply allegations that the defendants joined in doing acts otherwise alleged to be tortious. It is not now material to inquire whether *Bowen v. Matheson* should or should not have been held to belong to this class of cases, for it is settled in this Commonwealth, as we have already said, that the line within which a combination of individuals like a labor union must confine its actions is drawn much closer than in case of the same individuals acting separately.

The plaintiffs have asked us to find on the evidence that the actions of the unions and of the business agents and other officers and of the members in compelling L. P. Soule and Son Company to discharge "the plaintiffs was due in part to a desire to further and protect their own interests, or what they conceived to be such, but more to a reckless and wanton, if not malicious, disregard of the rights of the plaintiffs and of others engaged in the business of pointing and to a determination to force them out of business and thereby deprive them of their accustomed means of earning a livelihood."

We find on the evidence that the plaintiffs have not made out the fact that the defendants' action was due to a reckless and wanton, if not malicious disregard of the rights of the plaintiffs and of others engaged in the business of pointing. Under these circumstances we do not find it necessary to decide what would have been the result had we found that fact. See in this connection *Bowen, L. J.*, in *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, 615.

It follows that the third clause of the decree, which follows the third prayer of the bill, must be stricken out.

This brings us to the legality of the strike by the union bricklayers and masons employed by the L. P. Soule and Son Company on other buildings because that corporation was doing work on a building on which work was being done by pointers employed not by the L. P. Soule and Son Company but by the owners of the building.

That strike has an element in it like that in a sympathetic strike, in a boycott and in a blacklisting, namely: It is a refusal to work for A, with whom the strikers have no dispute, because A works for B, with whom the strikers have a dispute, for the purpose of forcing A to force B to yield to the strikers' demands. In the case at bar the strike on the L. P. Soule and Son Company was a strike on that contractor to force it to force the owner of the Ford Building to give the work of pointing to the defendant unions. That passes beyond a case of competition where the owner of the Ford Building is left to choose between the two competitors. Such a strike is in effect com-

pling the L. P. Soule and Son Company to join in a boycott on the owner of the Ford Building. It is a combination by the union to obtain a decision in their favor by forcing third persons who have no interest in the dispute to force the employer to decide the dispute in their (the defendant unions') favor. Such a strike is not a justifiable interference with the right of the plaintiffs to pursue their calling as they think best. In our opinion organized labor's right of coercion and compulsion is limited to strikes against persons with whom the organization has a trade dispute; or to put it in another way, we are of opinion that a strike against A, with whom the strikers have no trade dispute, to compel A to force B to yield to the strikers' demands, is an unjustifiable interference with the right of A to pursue his calling as he thinks best. Only two cases to the contrary have come to our attention, namely: *Bohn Manuf. Co. v. Hollis*, 54 Minn. 223, and *Jeans Clothing Co. v. Watson*, 168 Mo. 133. The first of these two cases was overruled on this point in *Gray v. Building Trades Council*, 91 Minn. 171. The conclusion to which we have come is supported by *My Maryland Lodge v. Addt*, 100 Md. 238; *Gray v. Building Trades Council*, 91 Minn. 171; *Purington v. Hinchliff*, 219 Ill. 159; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497; *Crump v. Commonwealth*, 84 Va. 927; *State v. Glidden*, 55 Conn. 46; *Purvis v. United Brotherhood of Carpenters*, 214 Penn. St. 348; *Gatzow v. Buening*, 106 Wis. 1; *Barr v. Essex Trades Council*, 8 Dick. 101; *Temperton v. Russell*, [1893], 1 Q. B. 715; *Taft, J.*, in *Toledo, Ann Arbor & North Michigan Railway v. Pennsylvania Co.*, 54 Fed. Rep. 730; *Loewe v. California State Federation of Labor*, 139 Fed. Rep. 71; *Hopkins v. Oxley Stave Co.*, 83 Fed. Rep. 912; *Casey v. Cincinnati Typographical Union No. 3*, 45 Fed. Rep. 135.

It is settled in this Commonwealth by a long line of cases that a defendant is liable for an intentional and unjustifiable interference with the pursuit on the part of the plaintiff of his calling, whether it be of labor or business. *Walker v. Cronin*, 107 Mass. 555. *Carew v. Rutherford*, 106 Mass. 1. *Vegelahn v. Guntner*, 167 Mass. 92. *Plant v. Woods*, 176 Mass. 492. *Martell v. White*, 185 Mass. 255.

For the reason that the strike on the buildings being erected by the L. P. Soule and Son Company was not a strike in a trade dispute between the union and that corporation, the first and second clauses of the decree were in substance correct. Robert H. Pickett, however, is the only plaintiff who is shown to have had any interest in the work on the Ford Building, and therefore the second clause of the decree alone should stand.

A few matters of detail remain to be dealt with.

All that the Bricklayers' Union No. 27 seems to have done was to adopt working rules making pointing a part of the trade of brick-

laying. There is no evidence that they authorized the sending of the circular letter or took part in the strike. That union and the members of it should be stricken from the decree.

No objection has been taken to the decree in favor of Robert H. Pickett on the ground that damages would have given him adequate compensation for breach of his contract. For that reason it is not necessary to consider whether his proper remedy was an action at law for damages, as in *Carew v. Rutherford*, 106 Mass. 1, *Walker v. Cronin*, 107 Mass. 555, *Berry v. Donovan*, 188 Mass. 353, and *Quinn v. Leatham*, [1901], A. C. 495.

There is a point of practice which must be noticed. As we have said, the plaintiffs have undertaken to make three unincorporated labor unions parties defendant. That is an impossibility. There is no such entity known to the law as an unincorporated association, and consequently it cannot be made a party defendant. That was conceded in *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901], A. C. 426. The point decided in that case was that the labor union defendant in that case could be sued because it was registered under Trades Union Acts 1871, c. 31, and 1876, c. 22. At law, if the objection is properly taken, every member of an unincorporated association must be joined as a party defendant. In equity, if the members are numerous, a number of members may be made parties defendant as representatives of the class. The practice in Massachusetts in suits against members of unincorporated labor unions generally has been in accordance with these well settled principles. See *Bowen v. Matheson*, 14 Allen, 499; *Carew v. Rutherford*, 106 Mass. 1; *Plant v. Woods*, 176 Mass. 492; *Martell v. White*, 185 Mass. 255. A trade union was made a party defendant in *Vegelahn v. Guntner*, 167 Mass. 92, and the anomaly seems to have escaped attention. The judge who entered the decree in the case at bar made it apply to the unions "and each and every member thereof." He seems to have treated the case as a case where a numerous body had been properly represented by defendants joined for that purpose. Possibly, so far as the trial of the case was concerned, the members of these two unions were in fact represented by the individual defendants. But there is nothing on the record which justifies a decree against "each and every member" of the three unions on the ground that the defendants were joined as representing the individual members of the unions constituting a numerous class of defendants. The three unions should be stricken from the bill as parties defendant, and proper allegations should be made to bind the members of the two unions as parties defendant. If the individual defendants were proper representatives of the members of the unions in question, and these members would suffer no damage from the bill being so amended now, that can be done. The cases are collected in *Fay v. Walsh*, 190 Mass. 374.

Upon the bill being so amended within sixty days the decree may be modified as hereinbefore set forth, and on being so modified, affirmed; otherwise the decree must be reversed.

So ordered.

KLINGEL'S PHARMACY *v.* SHARP & DOHME.

Court of Appeals of Maryland, November, 1906. 104 Md. 218.

THE case is stated in the opinion.

MCSHERRY, C. J. The question now before us is merely one of pleading and involves only the sufficiency of the averments of the declaration. To the declaration the defendants demurred and the Superior Court of Baltimore City sustained the demurrer and entered judgment for the defendants for costs, and from that judgment this appeal was taken. In order to determine whether the ruling of the Superior Court was correct it will be necessary to set forth with some fullness the allegation of the declaration; and the objections which have been urged against its legal sufficiency will then be stated and considered.

The declaration avers that Klingel's Pharmacy of Baltimore City, the plaintiff, is a duly licensed incorporated retail vendor of drugs and druggists' supplies; that it was and still is able, ready and willing to pay cash for all kinds of drugs and druggists' supplies needed by it and suitable for the proper conducting of its said business. That the defendants, the Calvert Drug Company, and Sharp & Dohme are corporations which have been for some time and still are engaged in the business of selling drugs and druggists' supplies. That the other defendant, the Baltimore Retail Drug Association, is a corporation formed and organized for the purpose, amongst other things, of unlawfully maintaining amongst dealers in drugs and druggists' supplies, the maximum rate schedule of prices and of preventing, in restraint of trade, all vendors of drugs and druggists' supplies, who are unwilling to acquiesce in and submit to the prices so fixed by it, from buying at any price the drugs and druggists' supplies needed and desired by them in their business, by the unlawful coercion of threats that any and all vendors of drugs and druggists' supplies who shall sell for less than the schedule prices shall be themselves blacklisted and all sales of drugs and druggists' supplies be refused them: and that all the members of said Retail Drug Association are bound by an agreement not to sell such supplies to any person or corporation who will not agree to maintain its maximum schedule of prices. That the plaintiff has steadily refused to become a member of said Baltimore Retail Drug Association, or to unite with it and with its members and with the other named defendants in said com-

bination and conspiracy to coerce the dealers in drugs and druggists' supplies to maintain said established prices by refusing to sell to them and by threats that unless they shall so maintain the same they shall be boycotted and placed on the blacklist and be disabled from buying any drugs and druggists' supplies whatever. That though the plaintiff has repeatedly applied to the Calvert Drug Company and to Sharp & Dohme and to sundry other druggists to sell to it drugs and druggists' supplies tendering itself ready, able and willing to pay cash, yet the said defendants and said other druggists have refused to sell it drugs or druggists' supplies at any price whatsoever, because of said unlawful conspiracy and combination, coupled with the threat that for any violation of such unlawful combination and conspiracy the parties violating it should themselves be blacklisted and all sales be refused to them. That the avowed object of the conspiracy was and is to maintain in restraint of trade a maximum price of drugs and druggists' supplies and to compel the plaintiff to become a member of said combination and to agree to charge all its customers such maximum price or to be driven out of business. That the Retail Drug Association is wholly composed in its membership of such vendors, and that the entire power of the association and of its members is unlawfully exerted to coerce, by blacklisting and by potent and effective threats of boycotting, the illegal purposes and acts aforesaid. That the wrongful refusal of the Calvert Drug Company and of Sharp & Dohme and of other parties to sell to the plaintiff was and is the direct result exclusively of said unlawful combination and conspiracy and of the wrongful actings and doings of said Retail Drug Association in carrying out the unlawful object and purpose of said conspiracy. That the action of the defendants is not an action taken by them in the bona fide exercise of their supposed right to sell or to refuse to sell to whomsoever they please, nor in the bona fide exercise of their supposed right to advise other vendors as to selling or not selling their drugs and druggists' supplies; but on the contrary that by the said combination and conspiracy the defendants did wrongfully and maliciously intend to injure and destroy the plaintiff's business; which they have succeeded in doing, and that such injury to the business of the plaintiff is the direct result of said illegal, malicious and wrongful conspiracy and of the acts done in furtherance thereof.

Here, then, it is distinctly charged that there is an unlawful conspiracy to exact and to maintain a maximum schedule of prices for drugs and druggists' supplies in restraint of trade; and it is with equal directness alleged that because the plaintiff will not enter into that combination and conspiracy no drugs or supplies have been or will be sold to it by the defendants; and that no other dealer in those articles is or will be allowed to sell to it without incurring the penalty of being blacklisted and boycotted as threatened by the defendants,

which action of the defendants was not taken in the bona fide exercise of their right to sell or to refuse to sell to whom they pleased, but was taken with a malicious intent to injure and destroy the business of the plaintiff, whereby the plaintiff has been wholly deprived of the ability to purchase supplies and has as a result been prevented from pursuing its lawful avocation. By sustaining the demurrer the Superior Court held that these facts, if true, did not constitute a valid cause of action. We are not apprised by the record as to the ground upon which the trial Judge based his decision; but the reasons assigned in the brief of the appellees to sustain that ruling are, first, because (a) an agreement or conspiracy not to sell to the plaintiff is not actionable; and, because (b) no facts are alleged that amount to unlawful coercion by the defendants to the damage of the plaintiff. Secondly, because the declaration is bad for misjoinder. These grounds are not tenable, as we shall see in a moment. They have been assumed obviously in consequence of a misinterpretation of the averments of the narr.

In the last analysis it will be seen that there are three salient facts averred in the declaration. First: A combination to exact and maintain a maximum schedule of prices for drugs and druggists' supplies is asserted to exist between the defendants and others in restraint of trade. That combination if it does exist, and we are bound to assume that it does when dealing with the issue raised by the demurrer, is a criminal conspiracy at the common law and is punishable by fine and imprisonment after indictment and conviction. It is the offence of forestalling the market, and is defined to be every practice or device by act, conspiracy, words or news to enhance the price of victuals or other merchandise. *Roscoe Ev.*, 437; 3 *Inst.*, 196; 3 *Bac. Ab.*, 261; 1 *Russ.*, 169. As it creates a monopoly it was held to be unlawful at the common law as being in restraint of trade and against public policy. *Mitchel v. Reynolds*, 1 *P. Wms.* 181. The English statutes on this subject which were merely declaratory of the common law were repealed by 7 & 8 *Vict.*, ch. 24. In the United States, whilst we hear little now about forestalling, engrossing or regrating, we hear much of "corners" and "trusts" which are, in many instances, the old offences under new names, since they are frequently attempts by a combination or conspiracy of persons to monopolize an article of trade or commerce and so to enhance its price. Where the direct and immediate effects of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are constantly being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. *Addyston*

Pipe & Steel Co. v. U. S., 175 U. S. 244. Though this was said by the Supreme Court in a case which arose under the anti-trust Act of Congress of July 2nd, 1890, it equally applies to combinations and conspiracies of the character described in the declaration set forth in the record now before us. A combination is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public, or oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief; and the same proposition in one form of expression or another, is laid down in all the criminal law. *Bish. Cr. L.*, sec. 172; *Desty Cr. L.*, sec. 2; 3 *Chitty Cr. L.*, sec. 1138; *Arch. Cr. Pr.*, 1830. A "corner" when accomplished by confederation, to raise or depress prices and operate on the market, is a conspiracy, if the means be unlawful. *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173; *People v. Melvil*, 2 *Wheeler Cr. C.* 262; *People v. North River Sugar Refining Co.*, 2 *L. R. A.* 33 and notes. In *Van Horn v. Van Horn*, 52 *N. J. L.* 284, it was ruled that an action will lie for a combination or conspiracy by fraudulent and malicious acts, to drive a trader out of business, resulting in damage. *S. C.* 10 *L. R. A.* 184.

The cases of *Kimball v. Harman and Burch*, 34 *Md.* 407, and *Robinson v. Park et al.*, 76 *Md.* 118, decide nothing at variance with the principles just stated. They hold that an act which does not constitute a cause of action when done by one person does not become actionable merely because it has been done by conspirators; that an unlawful combination to do an act, which, if done, would injure another, does not of itself and without more, furnish a ground for a civil suit; and finally, as a corollary to the previous proposition, that though a conspiracy to do an injury exists a plaintiff cannot recover against the conspirators unless some act has been done in furtherance of the conspiracy which has resulted in damage to him. "The quality of the act and the nature of the injury inflicted by it, must determine the question whether the action will lie." *Kimball v. Harman*, *supra*. Having described a combination which at the common law is a criminal conspiracy, the declaration proceeds to set forth the acts done in execution of the unlawful conspiracy, and to aver that they were maliciously done and then to allege the injury resulting therefrom.

The second salient fact averred in the narr. consists of a statement of the acts done in furtherance of the conspiracy. Those acts are twofold. First, a refusal by the defendants to sell to the plaintiff — an act they would have the legal right to do, if when done it were not done in the execution of and to carry into effect a criminal conspiracy in restraint of trade. And secondly, coercion and intimidation practised by the defendants upon other vendors of like commodities, by means of threats to blacklist and to boycott such vendors, if they

sold to the plaintiff any drugs or druggists' supplies, whereby they were deterred from selling those articles to the plaintiff, unless it joined the association.

"It is a part of every man's legal rights," said Judge Cooley, "that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice." Cooley, Torts, 278. Again: "The exercise by one man of his legal right cannot be a legal wrong to another. . . . Whatever one has a legal right to do another can have no right to complain of." *Ib.* 688. It was upon this principle that the decision in *Bohn Manf. Co. v. N. W. Lumbermen Assn.*, 54 Minn. 223, s. c., 21 L. R. A. 337, was placed. In that case a large number of retail lumber dealers formed a voluntary association by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers, not dealers, at any point where a member of the association was carrying on a retail yard, and they provided in their by-laws that whenever any wholesale dealer or manufacturer made any such sale, the secretary of the association should notify all members of the fact. The plaintiff having made such a sale, the secretary threatened to send notice of the fact to all the members of the association; and it was held that no action would lie and that there was no ground for injunction.¹ There was nothing unlawful in this. Each member of the association had the legal right to refuse to sell the lumber which he owned, if he saw fit to refuse, and the collective refusal of all members was equally lawful. So, too, the defendants in this case had a perfect legal right to refuse to sell to the plaintiff any drugs and druggists' supplies owned by them; and it would have been wholly immaterial whether that refusal was the result of whim, caprice, prejudice or malice, if the bare refusal to sell had been the head and front of their offending. But the refusal to sell was not the exercise of a legal right, if that refusal were a mere step in the development and enforcement of a scheme to forestall the market in restraint of trade, or to drive the plaintiff into becoming a member of an organization which would control the prices he could charge for his wares and which would thereby deprive him of the liberty to contract for the sale of his goods according to his own judgment of their value. Whilst an act which is in itself lawful can never become unlawful simply because it may be done by several persons instead of by only one; yet the same act may be unlawful when it is a means of accomplishing an unlawful end. An act performed in furthering an unlawful enterprise cannot be a lawful act, though the same act would be free from censure if done with some other view. If it be conceded that a person has the lawful right to do a thing irrespective of his motive for doing it, the proposition that

¹ See *Gray v. Trades Council*, 91 Minn. 171, cited ante, p. 394.

an act lawful in itself is not converted by a bad motive into an unlawful act, is a mere abstract truism. But if the meaning of the proposition is that when a person or an aggregation of persons, if influenced by one kind of motive, has a lawful right to do a thing, the act is still lawful when done with any motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, then the proposition is neither logically nor legally accurate: In so far as a right is absolutely and unqualifiedly lawful it is lawful whatever may be the motive of the actor; but in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause, and this justification may be found sometimes in the circumstances under which it is done, irrespective of motive, sometimes in the motive alone and sometimes in the circumstances and the motive combined. *Plant v. Woods*, 176 Mass. 492, s. c., 51 L. R. A. 339. The intent or knowledge with which an act is done may make a lawful act unlawful. It is no offence to receive stolen goods, it is an offence to receive them knowing them to be stolen. The act of receiving the goods is identically the same in each instance. In the one case it is lawful, in the other, the same act is unlawful because the scienter makes it so. To utter forged paper is no offence, but to utter it knowing it to be forged is criminal. It is the same act in each instance, but it is lawful or unlawful according to the absence or the presence of a guilty knowledge. Hence it is fallacious to say that an act which is lawful can never become unlawful; and equally fallacious to say that though it is lawful for a person to refuse to sell to another, it is also lawful for the same person in combination with others to likewise refuse to sell when such refusal forms part of a scheme to raise and maintain the price of commodities in restraint of trade, and is not the bona fide exercise of their right to refuse to sell.

The declaration goes a step further and charges that the defendants coerced other vendors of drugs and druggists' supplies to abstain from selling those articles to the plaintiff, and that they did this by means of threats of blacklisting and boycotting such vendors if they should sell to the plaintiff whilst it was not a member of that combination, by reason of which threats those vendors were intimidated and were deterred from selling to the plaintiff. The plain meaning of all this is, the defendants notified the plaintiff that unless it entered into the union or combination and charged the same prices which other members thereof were required to charge, the defendants would by threats of coercion, by blacklisting and by boycotting other dealers, deprive the plaintiff of the ability to carry on its lawful business. Is such an interference with the legal right of an individual to conduct a lawful business in a lawful way tolerated by the law? And can it be permitted to flourish unscathed be-

cause no open deeds of violence or breaches of the peace have been committed? It would be a reproach of the law if such were the case. A boycott means the confederation, generally secret, by many persons whose intent is to injure another by preventing all persons from doing business with him through fear of incurring the displeasure, persecution and vengeance of the conspirators. 8 Cyc. 639. The courts have generally condemned those combinations which are formed for the purpose of interfering, otherwise than by lawful competition, with the business affairs of others, and depriving them by means of threats and intimidations of the right to conduct the business in which they are engaged according to the dictates of their own judgment. *My Md. Lodge v. Adt*, 100 Md. 248. Whilst an owner of property has the legal right to refuse to sell it to another, and whilst as in the case of *Bohn Manf. Co. v. N. W. Lumbermen Asst.*, supra, several owners may unite to do the same thing, just as laborers may organize to improve their condition and to secure better wages and in fact may refuse to work unless such better wages are obtained still "the law does not permit either an employer or employee to use force, violence, threats of force or threats of violence, intimidation or coercion to secure these ends (*My Md. Lodge v. Adt*, supra), nor does it permit vendors to resort, with impunity, to the like means to force or compel others engaged in the same business to abandon their own method of conducting a lawful business in a lawful way. In *Erdman et al. v. Mitchell et al.*, 207 Pa. 79, it was held that a conspiracy by a number of persons that they will, by threats and strikes, deprive a mechanic of the right to work for others because he does not join a particular union, would be restrained. The case at bar involves no right of labor, but the principles which have upheld the jurisdiction of courts to intervene to prevent injury and loss that would result to both employer and employee if a threatened strike or boycott were not prevented, are broad enough to include the situation presented by the declaration now before us. In the case of *Plant v. Wood*, supra, it was held that members of a labor union were entitled to an injunction restraining the members of another union from which they had withdrawn, from doing acts in pursuance of a conspiracy to compel their reinstatement, by appeals to their employers to induce them to rejoin and to discharge them in case of refusal, accompanied by threats intimating results detrimental to the employers' business and property in case of a failure to comply, coercive in effect upon the will, although they committed no acts of personal violence or physical injury to property, where complainants have been injured by such acts, and there is reason to believe that further proceedings of the same kind are contemplated which will result in still more injury to them.

Judgment reversed.

BRENNAN *v.* UNITED HATTERS OF NORTH AMERICA.

Court of Errors and Appeals of New Jersey, November, 1906. 73 N. J. L. 729.

THE case is stated in the opinion.

PITNEY, J. This was an action of tort, brought to recover damages sustained by the plaintiff through interference by the defendants with his employment in his trade as a hatter. Plaintiff was a member of Local Union No. 17 of the United Hatters of North America. The defendants are this local union (sued under Pamph. 1885, p. 26, as a voluntary association consisting of more than seven members) and twelve individuals, one of whom was the secretary of the union, and the other eleven constituted a committee thereof, known as the "vigilance committee." The plaintiff's declaration contains three counts, of which the first indicates the ground of recovery that is established by the verdict. It alleges, in substance, that plaintiff was a member of the "United Hatters of North America, Local No. 17," and was employed by the firm of E. V. Connett & Co., in the trade and occupation of the manufacture of hats, in the capacity of foreman; that he was authorized, under the constitution and by-laws of the United Hatters, to act in such capacity, and was enjoying the benefit of a membership card issued by that association, certifying to his good standing; that the association and the individual defendants constituting its vigilance committee, in order to injure the plaintiff in his said trade and occupation, on August 6, 1902, maliciously and without reasonable or probable cause, pretending that plaintiff had violated the laws of the defendant "United Hatters of North America, Local No. 17," and without serving the plaintiff with written charges of the alleged violation, and without giving him notice of the hearing of said charges, adjudged the plaintiff to be guilty thereof, and directed that a fine of \$500 be levied upon him; that afterwards, on September 4, 1902, at a meeting of the defendant "United Hatters of North America, Local No. 17," the decision of the defendants adjudging the plaintiff guilty as aforesaid was reversed and set aside; that by reason of the plaintiff's refusal to pay the said fine the defendants withdrew from him the benefit of his membership card, by means whereof the said Connett & Co. were compelled to and did refuse to continue the plaintiff in their employ, as they otherwise would have done, and by reason thereof the plaintiff was prevented from exercising his trade and occupation of a hat manufacturer, and from obtaining any engagement or employment therein. As to this count the defendants pleaded the general issue — not guilty. A trial being had before the judge of the Essex Circuit Court and a jury, there was a general verdict in

favor of the plaintiff, and the consequent judgment is now before us for review.

The assignments of error relate to certain rulings of the trial judge that are evidenced by bills of exceptions. It appears that plaintiff was a member in good standing of the United Hatters' Union and was working in Connett's factory as one of several hundred men, all of whom belonged to the same union. He was a foreman, in receipt of \$18 per week as wages. By the rules of the union no man could be employed in such a shop unless his membership card or check was on deposit with the shop steward, who was an agent of the union at the factory. By the same rules members of the union were not permitted to work in the shop together with any man who was not a member of the union or not in possession of his card. The union included within its jurisdiction about 2,200 men, employed in about fifteen different factories, situate in a district comprising Orange, Hackettstown, Bloomfield, Millburn and Livingston. All the hat factories in this district were under the jurisdiction of the same union. By an agreement made between the union and the manufacturers, every man employed in any of these factories must have a membership card on deposit with the shop steward. It appears that by the rules of the union the association has power to fine and reprimand or otherwise punish any member violating the laws of the association or the rules of trade. The vigilance committee has power to transact any business pertaining to the welfare of the trade in the time intervening between the regular meetings of the union. By the rule relating to "Trial and Appeal," it is provided as follows: "Any member of this association shall be entitled to due notice and a fair trial upon being accused of any violation of its laws or the rules of trade, but no member shall be put on trial unless charges are submitted in writing by a member of the association." It appears that on August 5, 1902, a meeting of the vigilance committee was held, at the instance of two members of the association, named Sereno and Alvino, to investigate a complaint made by them on the authority of Foreman Brennan (the plaintiff herein) against one Trancone, to the effect that Trancone had accused them (Sereno and Alvino) of lying in wait around Brennan's house for the purpose of doing him some injury. Brennan was called before the meeting as a witness. Trancone appears to have been present as the party accused. Each was examined by the committee in the absence of the other. It appears from the minutes that in the course of the investigation Trancone stated to the committee (in Brennan's absence) that he himself had on several occasions paid Brennan small sums of money "to get good work," and that one Panegrasso had given money to Brennan for the same purpose. Trancone having retired from the presence of the committee, Brennan was recalled, and the statement made by Trancone before

the committee was read to him. Brennan denied it. The committee then called Trancone before Brennan to verify his statement. Trancone declared that his statement was true in every particular, and Brennan again denied the charge. Subsequently, at the same meeting, Panegrasso came before the committee, under escort of Brennan "as a witness to prove that Trancone lied." Trancone was recalled and reaffirmed his accusation in the presence of Brennan, Panegrasso and the committee. Thereupon all parties were notified to appear before the committee on the following afternoon (August 6th). Upon that date another meeting of the vigilance committee was held, concerning which the minutes disclosed only the following: "Timothy Brennan's case was then taken up, and Michael Panegrasso was called before the committee to answer the charge that he had ever given money to Brennan. He denied that he had ever given money to Brennan. Mr. Brennan was called and admitted having met Panegrasso in Bloomfield. Motion that Michael Panegrasso and Benedetto Trancone be fined the sum of \$500 each, \$250 down and \$5 per week, carried. Motion that Mr. Brennan be fined the sum of \$500, \$250 down and \$1 per week, and to give up his place as foreman for the space of one year in Connett's hat factory, carried unanimously." This action of the vigilance committee was reported to a meeting of the association held on the following date (August 7th), and a motion was carried that the report be adopted as read. It should be observed that this ratification by the association of the action of its committee is not mentioned in the plaintiff's declaration herein. In order to sustain the judgment under review, the declaration will be treated as amended, if necessary, in this regard. On August 15th the secretary of the union (who is one of the defendants herein) went to Connett's hat factory, where Brennan was working, explained to him the action taken by the vigilance committee and by the meeting of the association, and demanded payment of the \$250. Brennan refused to pay it, and the secretary thereupon went to the shop steward and took Brennan's check from the box. It is inferable from the evidence that this was done by the secretary in the regular course of his duty, and that in doing it he acted as agent for the association. Afterwards, and on the same day, Brennan's counsel wrote to the union, protesting against the action taken, on the ground that no charges had been preferred nor any notice of a trial or hearing given to him, as required by the laws of the association. Subsequently, and under date of August 17th, a charge was preferred in writing by Trancone, and Brennan was notified of a hearing before the vigilance committee to be held on the 18th. He declined to attend, on the ground that he could not appear legally until his card was returned to him, and on the further ground that members of the vigilance committee had made public statements showing that they were prejudiced against him. At a meeting of the association held

on September 4th a motion that Brennan be exonerated was carried by a two-thirds vote. Shortly thereafter his card was returned to him and he went back to work in the Connett factory. On August 15th, a few minutes after the secretary of the union took up Brennan's membership card, he was discharged by the head foreman on the ground that Brennan no longer had his check in the box. Upon being exonerated by the union, Brennan informed the head foreman of the fact, and was immediately reemployed.

The trial judge, having denied a motion for nonsuit made at the close of the plaintiff's case, and a motion for direction of a verdict in defendants' favor made at the close of the whole case, submitted the issue to the jury, with instructions to the effect that if they found the plaintiff had sustained damage from the acts of the defendants in the premises, and if the vigilance committee proceeded against the plaintiff without charges submitted in writing, without notice to the plaintiff, or without fair trial, then, unless the plaintiff had waived his rights by submitting himself to the jurisdiction of the vigilance committee or of the association, he was entitled to recover to the extent of the pecuniary injury that was the natural result of the action of the defendants. Other and more questionable elements of damage were included in the instructions, but any ground of complaint in this regard was waived upon the argument here.

Reversal is asked upon only two grounds, both of which are assumed to have been raised in the motion for nonsuit and for direction of a verdict, viz.: First. That the suspension or expulsion of a member of a labor union (it being a voluntary, unincorporated association) in cases where no property right are involved, cannot support a claim for damages against the union by the member so expelled or suspended. And, secondly, that the plaintiff had no right to complain of his trial and consequent suspension, and this on the ground that the charge made by Trancone against him was put in writing and read to the plaintiff; that he participated in the trial before the vigilance committee and produced witnesses who testified in his behalf; that he received notice of the hearing before the committee upon the second day, at which hearing he attended, with witnesses, and was tried in accordance with the rules and by-laws of the association; and that he waived any formalities that may not have been strictly observed by failing to object to the proceedings for irregularity.

To deal with the second point first. [The court held that the subject matter of the charges was within the jurisdiction of the committee, but that there had not been "due notice" given, nor had the charges been submitted in writing as required by the rules.]

To return, now, to the first and main question raised by the plaintiffs in error. We think too narrow a view is taken of the plaintiffs'

ground of action when it is regarded as resting merely upon his suspension from the labor union. In our opinion, the gist of the action is the damage caused to the plaintiff by an unwarranted interference with him in his employment as a hatter. If the framer of the declaration, instead of including in that pleading averments respecting the proceedings of the vigilance committee and of the other defendants that eventuated in the withdrawal of the plaintiff's membership card, had contented himself with averring that defendants had unlawfully and without just cause or excuse procured plaintiff's discharge by his employer, it would, as we think, have set forth the material averment upon which his right of action depends. Defendants might then have pleaded that his discharge resulted solely from the withdrawal of his membership card, and that this resulted from his conviction of an offence against the rules of trade, after a fair trial had upon charges submitted by a member in writing, and on due notice to the plaintiff, in accordance with the laws of the association of which he was a member. This course of pleading would have presented the so-called trial and conviction of the plaintiff in its true light, as an alleged justification or excuse for the action of the defendants in procuring his dismissal from employment. No doubt plaintiff's membership in the defendant association imports his consent (so far as he had lawful power to give consent) to the discipline of the association, if carried out in good faith and without malice, through the methods prescribed by the laws of the association and in accordance with the principles of natural justice. Assuming the defendant association to have been organized for lawful purposes only, plaintiff had lawful power to give his consent to its discipline, to be exercised in furtherance of such purposes. And, assuming that the method adopted by the defendant association of establishing an agreement with the manufacturing hatters in all the factories throughout an extensive district, to the effect that none but members of the association should be employed in their shops, was not unlawful, the plaintiff might assent that upon his being in due course suspended from membership in the association, after a proper conviction, upon charges submitted and tried in accordance with its rules, he should lose his place of employment and his opportunity of gaining other employment within the district. We say assuming such an agreement not to be unlawful, because in our view its lawfulness admits of question. In *Curran v. Galen*, 152 N. Y. 33, certain brewery companies in the city of Rochester, having formed themselves into a brewers' association, made an agreement with a labor union, composed of workmen employed in the brewing business in that city, to the effect that all employees of the brewery companies should be members of the union, and that no employees should work for a period longer than four weeks without becoming a member. It was held (as we read the opinion) that the purpose of the union that no

employee of a brewing company should be allowed to work without becoming a member of the union, and that the contract referred to should be availed of to compel the discharge of an independent employee, was in effect a threat to keep persons from working at the particular trade and to procure their dismissal from employment; and that this plan of compelling workmen, not in affiliation with the organization, to join it at the peril of being deprived of their employment and of the means of making a livelihood, was unlawful. In the more recent case of *Jacobs v. Cohen*, 183 N. Y. 207, a contract between a single firm of employers and a labor union, whereby the firm agreed for a certain period to employ and retain only members of the union, and the latter for the same period bound themselves to furnish the services of its members, was held not violative of public policy, on the ground, among others (see page 211) that "its restrictions were not of an oppressive nature, operating generally in a community to prevent such craftsmen from obtaining employment and from earning their livelihood." Whether these decisions are consistent with each other is a question that may require consideration at a future time. At the same time, *Protective Ass'n v. Cumming*, 170 N. Y. 315, may come under consideration. *Plant v. Woods*, 176 Mass. 492, *Berry v. Donovan*, 188 Mass. 353, and many of the cases cited below, may also throw light upon the lawfulness of such a trade agreement.

In the present case, indeed, it is argued, and with much force, by the learned counsel for plaintiffs in error, that the value of the right of membership in the defendant association consists in participation in a more or less complete monopoly of the labor market in the particular trade in question; that so far as labor unions are organized for the purpose of monopolizing to their members the labor market in any particular trade, that purpose constitutes such unions unlawful associations; and that the plaintiff's right to retain employment or to secure new employment was so dependent upon his participation in such an unlawful monopoly that his suit for damages arising out of a disturbance of this right is not to be sustained. This argument has an odd sound, proceeding, as it does, from the labor organization itself; for if the purposes of the defendant association, as disclosed in the record before us, be in truth unlawful, that circumstance does not, in our view, tend to overthrow the judgment under review. The plaintiff's right of action, as we regard it, does not rest upon any assertion of the alleged monopoly, but upon a repudiation of the very course of procedure that was invoked in his case to establish the monopoly. It is settled that, where a party has entered into an agreement that is void because contrary to public policy, his right to recover upon a ground of action that exists independent of the agreement is not overthrown by the operation of the maxim *in pari delicto*. *Cone v. Russell*, 3 Dick. Ch. 208, 217, and cases cited; *Easton Na-*

tional Bank *v.* American Brick & Tile Co. (Green's Appeals) 64 Atl. 917, decided by this court in June last. See also, Delaware, Lack. & Western R. R. Co. *v.* Trautwein, 23 Vroom. 169, Newbury *v.* Luke, 39 Id. 189. But the question thus argued by counsel for plaintiffs in error does not, as we take it, press for determination in this case. Had plaintiff's discharge from employment resulted from a due course of procedure had against him in the association, in accordance with the by-laws to which he had given his consent, and had such procedure been set up as a justification or excuse for those who procured his discharge, he might have raised the question of the unlawfulness of the trade agreement with the manufacturing hatters, in order to show that the alleged excuse or justification was not a lawful one. But since, upon the record before us, it must be held that plaintiff's suspension from the association and the consequent withdrawal of his membership card were not warranted by the laws of the association, because the tribunal that tried him acted without jurisdiction, it is unnecessary to pursue the inquiry whether the defendant association, by establishing a trade agreement that tended to promote a monopoly and to deprive workmen in the hatter's craft of a fair opportunity to obtain employment, had violated the law or the public policy of this state.

Stripped, therefore, of all redundant matters, the question presented is whether the acts of the defendants, including the unwarranted conviction of the plaintiff by the vigilance committee, their sentence that he should pay a money fine and give up for one year his position as foreman in the Connett factory, the ratification of this conviction and sentence by the defendant association, and the consequent withdrawal of plaintiff's membership card from the steward at the factory, when the natural and proximate result of that course of action, intended and designed by the defendants to ensue, was to interfere with the plaintiff's continued employment in the factory, and thereby prevent him from gaining a livelihood for himself and his family, followed by actual damage accruing to the plaintiff in the premises, constitute an actionable injury. We say that the natural and proximate result of withdrawing the plaintiff's membership card was his dismissal from the factory, because such was not only a reasonable inference to be drawn by the jury from the evidence, but, indeed, was the only reasonable inference. Upon the evidence, the membership card was the token, and the only token, that manifested plaintiff's right to continued employment in the factory under the trade agreement already referred to. That agreement was not of itself the proximate cause of his dismissal, but merely produced the condition under which the withdrawal of the card became effective in procuring his dismissal. The evidence is clear that it was because of the withdrawal of the card, and for that reason only, that the superintendent of the factory discharged the plaintiff, and

that his refusal to do so would at once have put the factory out of business by the refusal of all the other men to continue at work. We say, also, that the plaintiff's discharge was intended and designed by the defendants to ensue. It is true that the immediate occasion of the withdrawal of the card was plaintiff's refusal to pay the fine. But, that fine having been unwarrantably imposed upon him, he, of course, was justified in refusing to pay it. And since the defendants were charged with notice of the facts that show the fine was unwarranted, they were not entitled to anticipate that the plaintiff would submit to pay it. Moreover, a part of the penalty imposed, in addition to the fine, was that plaintiff should give up for one year his place as foreman in the factory. Defendants had no right to assume that plaintiff would be willing to continue in any other grade of employment, nor that the Messrs. Connett would give him other employment, if the plaintiff were willing to accept it.

In dealing with the question of the plaintiff's right to recover, it is to be observed that the action taken by the defendants was not in the course of any legitimate competition for the place held by the plaintiff in the factory, but was taken in order to discipline and punish him for an offence of which he was presumably innocent, and of which he had not been duly found guilty. The common law has long recognized as a part of the boasted liberty of the citizen the right of every man to freely engage in such lawful business or occupation as he himself may choose, free from hindrance or obstruction by his fellow men, saving such as may result from the exercise of equal or superior rights on their part — such, for instance, as the right of fair competition in the like field of human effort — and saving, of course, such other hindrance or obstruction as may be legally excused or justified. This right is declared by our Constitution to be unalienable. The first section of the Bill of Rights sets forth that “all men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.” As a part of the right of acquiring property there resides in every man the right of making contracts for the purchase and sale of property, and contracts for personal services which amount to the purchase and sale of labor. It makes little difference whether the right that underlies contracts of the latter sort is called a personal right or a property right. It seems to us impossible to draw a distinction between a right of property and a right of acquiring property that will make a disturbance of the latter right any less actionable than a disturbance of the former. In a civilized community which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his efforts

to acquire it. The cup of Tantalus would be a fitting symbol for such a mockery. Our Constitution recognizes no such notion.

Actions like the present, although they have been treated by some judges in recent years as a comparative novelty, do not, in our opinion, rest upon any novel principle. They are essentially analogous to the familiar action for enticing away one's servant. In such cases, as was said by Justice Van Syckel, in *Noice, Adm'x v. Brown*, 10 Vroom, 572: "It is well settled that a person who, knowing the premises, induces another to break a subsisting contract of service, is liable to an action for the damages which ensue to the employer. Whether an action will lie when there is no binding contract to continue in service is perhaps not so clear; but I think it may be maintained, both upon reason and authority, where it is merely a subsisting service at will. In such service, like a tenancy at will, their relation must be ended in some way before the rights of the master can be lost. By the unwarrantable interference of a third party the employer is deprived of what he otherwise might have retained." . . . [The court cited *Hughes v. McDonough*, 43 N. J. L. 460, and proceeded:] Among the illustrative cases cited is *Keeble v. Hetheringill*, 11 East, 574n, the famous "decoy case." In *Van Horn v. Van Horn*, 27 Vroom, 318, this court sustained an action against a single defendant for injuring the plaintiff's business by false and malicious statements concerning his character. Many English cases were cited, among them *Lumley v. Gye*, 2 El. & B. 216,¹ and *Bowen v. Hall*, L. R. 6 Q. B. Div. 333; also the Massachusetts case of *Walker v. Cronin*, 107 Mass. 555. Justice Van Syckel said that "the rule to be deduced from the cases is that, while a trader may lawfully engage in the sharpest competition with those in the like business, by representing his own wares to be better, . . . yet, when he oversteps that line, and commits an act with the malicious intent of inflicting injury upon his rival's business, his conduct is illegal, and if damage results the injured party is entitled to redress. Nor does it matter whether the wrongdoer effects his object by persuasion or by false representation. The courts look through the instrumentality or means used to the wrong perpetrated with a malicious intent, and base the right of action upon that." Our Court of Chancery, in *Barr v. Essex Trades Council*, 8 Dick. Ch. 101, 115, *Frank and Dugan v. Harold*, 18 Id. 443, and *Jersey City Printing Co. v. Cassidy*, Id. 759, has affirmed the right of the citizen to conduct his business free from malicious interference, including his right to have free opportunity to hire employees. And we may remark that the right of one seeking employment to have free opportunity to gain employment, and to retain a position of employment once it is gained, is as precious in the eye of the law as the right of the employer.

The above cases illustrate the views that our courts have taken

¹ Ante, p. 329.

of cognate questions. We recall no case in this state that is precisely in point with the present. In examining reported decisions in other jurisdictions, we frequently find the question of malice discussed — malice being commonly treated as an essential ingredient of an action like the present. But malice in the law means nothing more than the intentional doing of a wrongful act without justification or excuse.¹ *King v. Patterson*, 20 Vroom, 417; *McFadden v. Lane*, 42 Id. 624, 630. And what is a wrongful act, within the meaning of this definition? We answer, any act which in the ordinary course will infringe upon the rights of another to his damage is wrongful, except it be done in the exercise of an equal or superior right. In *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 598, 613,² Lord Justice Bowen said: "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that other person's property or estate, is actionable, if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong." This statement was cited with approval by Green, V. C., in *Barr v. Essex Trades Council*, 8 Dick. Ch. 101, 117. In our opinion it is a correct statement of the law and is as applicable to acts affecting a man's right to secure and retain employment as to his right to acquire and retain property or trade. In *Walker v. Cronin*, 107 Mass. 555, the declaration averred that the plaintiff was a manufacturer of shoes, and for the prosecution of his business it was necessary for him to employ many shoemakers, and the defendant, knowing this, unlawfully and without justifiable cause, molested him in carrying on said business with the unlawful purpose of preventing him from carrying it on, and wilfully induced many shoemakers who were in his employ, and others who were about to enter into it, to abandon it without his consent and against his will, whereby the plaintiff lost their services and the profits that he would otherwise derive therefrom, and was put to expense to procure other workmen. The court sustained the right of action. See also, *Martell v. White*, 185 Mass. 255, and *Berry v. Donovan*, 188 Mass. 353, two recent and instructive cases. A very recent Connecticut decision may also be noted. *March v. Bricklayers' and Plasterers' Union*, 63 Atl. 291. [The court discussed *Bowen v. Hall*, 6 Q. B. D. 833 and *Temperton v. Russell*, [1893], 1 Q. B. 715, and proceeded:] The celebrated case of *Allen v. Flood*, [1898] A. C. 1 is cited by the learned counsel for plaintiffs in error herein. [The court discussed *Allen v. Flood* at length, and continued:]

If we have correctly apprehended the essential grounds upon which proceeded the judgment of the majority of the House of Lords in this case, the decision is not antagonistic to the plaintiff's

¹ I. e. In this class of cases.

² Ante, p. 346.

right of action in the present instance. It seems to have been held that Allen's conduct amounted to no more than legitimate persuasion; that he violated no legal right of Flood and Taylor, did no unlawful act, and used no unlawful means in procuring their dismissal; and that his conduct was therefore not actionable, however malicious or bad his motive might be. Such, indeed, is the abstract of the decision as contained in the syllabus. In the case before us, however, the defendants were not acting within their legal rights, because, as already appears, even if the general object of the defendant association in respect of controlling the hatters' trade in the district covered by their operations be assumed to be lawful, yet their interference with the plaintiff in his occupation, in the manner in which they did interfere, was to be justified only in the event that plaintiff was first duly convicted and sentenced in accordance with the procedure prescribed by the laws of the defendant association, and this had not been done. No doubt, however, there is much in the reasoning of the lords who voted for reversal in *Allen v. Flood* that, if accepted, would tend to negative a right of action in the present case. Time will not admit of an exhaustive review of that reasoning. We content ourselves with saying that it does not commend itself to us. We cannot agree that no legal right of Flood and Taylor was interfered with, because they had no legal right to insist upon their continued employment with the Glengall Company. They were none the less entitled to the reasonable expectation that their employment would continue, and it did not lie in the mouth of one who, without warrant, had interfered with their status as employees to say that, if he had not done so, their employer might have terminated the status of his own accord. Nor can we agree that Allen was acting in the exercise of any absolute right. His rights, like all personal rights that are to be enjoyed in a state of society, were qualified to a material extent when they came into conflict with the rights of others. Without reviewing the elaborate opinions, it is sufficient to say that the general course of reasoning of those judges and lords who maintain the right of action is, to our minds, the more satisfactory.

Allen *v.* Flood is practically overruled by the decision of the House of Lords in *Quinn v. Leatham*, [1901], A. C. 495,¹ where it was held that a combination of two or more, without justification or excuse, to injure a man in his trade by enticing his customers or servants to break their contracts with him or not to deal with him or continue in his employment, is actionable, if it results in damage to him. And a subsequent decision in the Court of Appeal is to the same effect. *Giblan v. Nat. Amalgamated Union*, [1903], K. B. 600. These two cases are clear authorities for the present action. The latter case is quite in point. Giblan was a member of the union, and was in-

¹ Ante, p. 362.

debted to it in a considerable sum for moneys that had been intrusted to him as treasurer of one of its branches. In order to compel him to pay this money, the union, through two of its officers (whose acts were afterwards approved by the union), undertook to prevent, and did prevent, plaintiff from getting or retaining employment, by calling out or threatening to call out the men. It was held that the union and its officers were liable in damages for interfering with Giblan in the exercise of his common-law right to dispose of his labor according to his will, and that their action was not justified by the fact that it was taken for the purpose of compelling him to make good his defalcation. Upon both reason and authority, therefore, we are of the opinion that the acts of the defendants herein, as above recounted, amounted to an unwarranted interference with the plaintiff in his trade as a hatter; and, he having sustained damage as a result thereof in losing his place of employment, the present action is sustainable.

The judgment under review will be affirmed, with costs.

For reversal — Green.

CHAPTER XII.

SLANDER AND LIBEL.

COOPER *v.* GREELEY.

Supreme Court of New York, July, 1845. 1 Den. 347.

DEMURRER to pleas, in an action for libel. The declaration, after the usual introductory matter, alleged in the first count, the publication by the defendants in the New York Tribune, of a certain false and malicious libel of and concerning the plaintiff, containing (*inter alia*) the following matter, which is set out with innuendoes, applying it to the plaintiff.

" . . . He chooses to send none, but a suit for libel instead. . . . There is one comfort to sustain us under this terrible dispensation. Mr. Cooper will have to bring his action to trial somewhere. He will not like to bring it in New York, for we are known here, nor in Otsego, for he is known there." An innuendo followed, averring the meaning to be that the plaintiff, in consequence of being known in the county of Otsego, was in bad repute there, and would not for that reason, like to bring a suit for libel in that county. The second count averred publication by the defendants of another alleged libel. The defendants, besides the general issue, pleaded several special pleas. The plaintiff demurred to each of the special pleas, and the defendants joined in demurrer.

JEWETT, J. The first question presented is whether the first count of the declaration is good in substance. If not, it follows that the pleas interposed to that count need not be examined for the purpose of giving judgment on the demurrer; the rule being that where the count is so defective that a verdict will not cure it, the defendant on demurrer to his plea may fall back upon the count. *Miller v. Maxwell*, 16 Wend. 9. The defendants contend that the publication set forth in this count is not libellous. For the plaintiff it is insisted that it contains a charge that he was in bad repute in the county of Otsego, in consequence of being known in that county; and that on that account he would not like to bring a libel suit to trial there. The inquiry is, how is this publication to be understood? It is the duty of the court, in an action for a libel, to understand the publication in the same manner as others would naturally do. "The construction which it behooves a court of justice to put on a publication which is alleged to be libellous is to be derived as well from the expressions used as from the whole scope and apparent object

of the writer." *Spencer v. Southwick*, 11 John. R. 592, per Van Buren, Senator; see also *Fidler v. Delavan*, 20 Wend. 57. It seems to me that the innuendo affixes the true meaning to the words. It may be admitted that the charge is not made in an open and direct manner. It seems to be ironical. But an imputation conveyed in that form is not the less actionable. The sting of the words in this case is in the imputation which it is alleged they convey, that the plaintiff had acquired so odious a reputation in Otsego county that, knowing enough of the influence of human action justly to apprehend danger to himself for that cause upon such a trial there, he would not dare to risk a trial in that county. Assuming this to be the true meaning of the publication, the inquiry follows — whether such language with such meaning and application is libellous within the rules of law applicable to the action for libel. The counsel for the defendants, although they did not admit on the argument that even such language could be considered libellous within their understanding of what they denominated the modern definition of libel, yet undertook to show by argument and authority that at the period when the late Chancellor Kent, and Chief Justice Spencer, and their associates, held seats in this court, the rule in regard to what published words amounted to a libel was, more than forty years ago, greatly and unjustly extended. The definition of a libel submitted arguendo by the late General Hamilton, and adopted by the court in *The People v. Croswell*, 3 John. Cas. 354, and subsequently approved of by the court in *Steele v. Southwick*, 9 John. R. 215, is complained of as erroneous. The court in the case last cited said that "a writing published maliciously with a view to expose a person to contempt and ridicule is undoubtedly actionable; and what was said to this effect by the judges of the C. B. in *Villers v. Monsley*, 2 Wils. 403, is founded in law, justice and sound policy. The opinion of the court in the case of *Riggs v. Denniston*, 3 John. Cas. 205, was to the same effect; and the definition of a libel as given by Mr. Hamilton in the case of *The People v. Croswell*, 3 John. Cas. 354, is drawn with the utmost precision. It is a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals. To allow the press to be the vehicle of malicious ridicule of private character, would soon deprave the moral taste of the community, and render the state of society miserable and barbarous." In the case of *Cropp v. Tilney*, 3 Salk. 226, Holt Ch. J. said, "scandalous matter is not necessary to make a libel. It is enough if the defendant induces an ill opinion to be held of the plaintiff, or to make him contemptible, or ridiculous." Any written slander, though merely tending to render the party subject to disgrace, ridicule, or contempt, is actionable, though it do not impute any definite crime punishable in the temporal courts. 3 Bl. Comm. Chitty's ed. 123, note 5.

But it is argued that the publication in question is not libellous, even admitting the definition of libel adopted by this court in *The People v. Crosswell* and in *Steele v. Southwick*. It is denied that it is a censorious or a ridiculing writing; and although it is conceded that it reflects upon the plaintiff, it is said that it does not do so in a *severe* or censorious manner; and that it does not convey any sentiment or ridicule. The admission that the publication reflects upon the plaintiff, though qualified by the remark that it does not do so severely, yields the material point in controversy. The degree of censure or ridicule does not enter into the definition. "A censorious or ridiculing writing towards an individual" is defined to be a libel, "if made with a mischievous and malicious intent." "Censoriousness" is defined by Webster to be a "disposition to blame and condemn — the habit of censuring or reproaching." He defines the word "reflect," in his fifth subdivision, thus: "to bring reproach; to reflect on; to cast censure or reproach." It would seem to me that if a censorious writing made with a mischievous and malicious intent towards an individual is libellous, a writing made with a like intent reflecting upon an individual, whether more or less severely, would be none the less libellous. But I do not think that the rule requires any such aid. It is enough that we approve of the rule as settled, acted upon and undeviatingly adhered to by this court for about forty years. The objection that the innuendo is not justified by the language of the publication is one which can only be reached by special demurrer. The office of an innuendo is to apply the libel to the precedent matter; and it cannot be used to add to, enlarge, extend or change the sense of the previous words; and where the new matter stated in the innuendo is not necessary to support the action, it may be rejected as surplusage. 1 Chit. Pl. Day's ed. 382; 2 Dane's Ab. 596; *Thomas v. Crosswell*, 7 John. R. 270; *Roberts v. Camden*, 9 East. 93. An innuendo may explain the meaning of words, though it cannot enlarge it without the aid of a colloquium; and a leading case on this point is where, in an action for slander, the words were, "He has burnt my barn," and it was held that the plaintiff could not say by way of innuendo, "my barn full of corn." But if the introduction to the count in the case had contained an averment that the defendant had a barn full of corn, and that in a discourse about it he spoke the words — then an innuendo stating the meaning of the words to be "a barn full of corn" would have been good. In such a case the innuendo would explain and apply the preceding parts of the declaration, by showing that the defendant's words were uttered in a conversation about a barn of the defendant's which was full of corn. In *Van Vechten v. Hopkins*, 5 John. R. 220, Van Ness, J., explains the meaning of an averment, of a colloquium and of an innuendo. An averment is to ascertain to the court that which is doubtfully expressed, and to add matter to make doubtful things

clear. A colloquium shows that the words were spoken in relation to the matter of the averment, and an innuendo is explanatory of the subject-matter sufficiently expressed before. The colloquium in this count was for the purpose of showing that the libel was published, as it is expressly alleged to have been, "of and concerning the plaintiff." An innuendo is an averment that such a one means such a particular person or that such a thing means such a particular thing; and with the introductory matter it forms a connected proposition by which the cognizance of the charge will be submitted to the jury, and the cause of action appear to the court. The innuendo in this case, which states the meaning of the publication to be that the plaintiff, in consequence of being known in the county of Otsego, was in bad repute there, and would not for that reason like to bring a suit for a libel in that county, appears to me to express the true meaning of the publication. The question whether the alleged libel was published of and concerning the plaintiff, and whether the true meaning of the words is such as is alleged in the innuendo or not, is a question of fact which belongs to the jury and not to the court to determine. *Van Vechten v. Hopkins*, 5 John. R. 221; *Goodrich v. Woolcot*, 3 Cowen, 231; *Peake v. Oldham*,¹ Cowp. 275; 2 Bl. R. 961; *Dexter v. Taber*, 12 John. R. 239. It is well settled that where the slanderous charge may be collected from the words themselves or from the general scope of the publication, it is not necessary to make any averment as to circumstances to the supposed existence of which the words refer. So where the libellous meaning is apparent on the face of the declaration, innuendoes and averments are unnecessary; but if introduced and not warranted by the subject-matter, they may be rejected as surplusage. *Croswell v. Weed*, 25 Wend. 621. The proposition of the defendant's counsel, that to render a publication actionable it must impute a crime, cannot be sustained. This rule has never been extended to libels in this state, nor has it been in England for the last one hundred and fifty years. The first action for a libel found in our books of reports is that of *Riggs v. Denniston*, before cited, which was decided in 1802. The late Chancellor, (then Mr. Justice Kent,) in delivering the opinion of this court, observed that the charges against the plaintiff were clearly libellous, because they threw contumely and contempt upon him in his character as a commissioner of bankruptcy—instead of holding them actionable as subjecting the plaintiff to the loss of his office. And such has been the doctrine of this court from that time to the present. In *Van Ness v. Hamilton*, before cited, Chief Justice Spencer said: "It may however be observed in the outset, that there exists a decided distinction between words spoken, and written slander. To maintain an action for the former cause, the words must either have produced a temporal loss to the plaintiff, by reason of special dam-

¹ Post, p. 425.

age sustained from their being spoken, or they must convey a charge of some act criminal in itself and indictable as such, and subjecting the party to an infamous punishment, or they must impute some indictable offence involving moral turpitude. To maintain an action for a libel, it is not necessary that an indictable offence should be imputed to the plaintiff. If a libel holds a party up to public scorn, contempt and ridicule, it is actionable." It is insisted by the defendants' counsel, that in the early stages of the law of libel, there was no distinction between written and verbal slander, and that no action could then have been maintained for any words written for which an action could not be maintained if they were spoken. The case of *Thorley v. Lord Kerry*, 4 Taunt. 355,¹ decided in the exchequer chamber in 1812, is, among other cases, relied on to sustain that position. That was an action for a libel charging the plaintiff with being a hypocrite, and with having used the cloak of religion for unworthy purposes. The plaintiff obtained a verdict and had judgment in the king's bench without argument, which was affirmed in the exchequer chamber upon error brought by the defendant. Sir J. Mansfield, C. J., in delivering the opinion of the court, stated that the words, had they merely been spoken, would not have been actionable; and while he disapproved of the distinction which he admitted had prevailed for more than a century past between written and spoken scandal, he said that as the rule and distinction had been so firmly established by some of the greatest names known to the law, and from a time at least as far back as the time of Charles the Second, he could not venture to lay down at that day that no action could be maintained for any words written for which an action could not be maintained if they were spoken. The rule is repeated in *Starkie on Slander*, 1 vol. by Wendell, p. 169. After a review of all the cases on the subject, this writer says: "Upon the whole it may be collected that any writings, pictures or signs, which derogate from the character of an individual, by imputing to him either bad actions or vicious principles, or which diminish his respectability and abridge his comforts by exposing him to disgrace and ridicule, are actionable without proof of special damage; in short, that an action lies for any false, malicious and personal imputation effected by such means and tending to alter the party's situation in society for the worse." The rule is the same and the like distinction prevails in Massachusetts. *Clark v. Binney*, 2 Pick. 113. Assuming that at an early period of the law, before the art of printing was invented or perfected, the distinction between words spoken and written slander was not recognized, the change may, I apprehend, be accounted for by the greater necessity for such a distinction in more modern times, when the tendency of the public press is so strong to licentiousness. It does not appear to me that individual character is more than ade-

¹ Post, p. 449.

quately protected by the legal remedies, civil and criminal, which the law as it has been established for the last century and a half, both in England and in this country, affords. If this court were competent to repudiate a distinction so well settled as that between written and spoken scandal, public policy would, in my opinion, interpose to prevent it. . . . [The court discussed the sufficiency of the defendants' pleas, and concluded:] The plaintiff is entitled to judgment upon the demurrer to the several pleas to the second count, and the defendants to judgment upon the demurrer to the pleas pleaded to the first count, with leave to each party to amend on the usual terms.

Judgment accordingly.

HANSON v. GLOBE NEWSPAPER COMPANY.

Supreme Court of Massachusetts, June, 1893. 159 Mass. 293.

THE case is stated in the opinion.

KNOWLTON, J. The defendant published in its newspaper an article describing the conduct of a prisoner brought before the Municipal Court of Boston, and the proceedings of the court in the case, designating him as "H. P. Hanson, a real estate and insurance broker of South Boston." He was, in fact, a real estate and insurance broker of South Boston, and the article was substantially true, except that he should have been called A. P. H. Hanson instead of H. P. Hanson. The plaintiff, H. P. Hanson, is also a real estate and insurance broker in South Boston, and in writing the article the reporter used his name by mistake. The justice of the Superior Court, before whom the case was tried, without a jury, "found as a fact that the alleged libel declared on by the plaintiff was not published by the defendant of or concerning the plaintiff," and the only question in the case is whether this finding was erroneous as matter of law.

In a suit for libel or slander, it is always necessary for the plaintiff to allege and prove that the words were spoken or written of and concerning the plaintiff. In *Baldwin v. Hildreth*, 14 Gray, 221, the declaration was adjudged bad on demurrer, because this allegation was wanting. The rule is affirmed, and authorities are cited, in *McCallum v. Lambie*, 145 Mass. 234. The form of declaration prescribed by the Practice Act in slander uses the phrase "words spoken of the plaintiff," and in libel, "false and malicious libel concerning the plaintiff." Pub. Sts. c. 167 s. 94. It has often been held that it is a question of fact for the jury whether the words were or were not spoken or written "of and concerning the plaintiff." *Van Vechten v. Hopkins*, 5 Johns. 211, 221. *Gibson v. Williams*, 4 Wend. 320. *Smart v.*

Blanchard, 42 N. H. 137. *De Armond v. Armstrong*, 37 Ind. 35. *Goodrich v. Davis*, 11 Met. 473, 480, 481, 484. *Miller v. Butler*, 6 Cush. 71. The defendant's meaning in regard both to the person to whom the words should be applied and the imputations against him is always to be ascertained. In *Smart v. Blanchard*, *ubi supra*, it is said that "the meaning . . . in this respect (as to the person to whom the libel applies) is undoubtedly a question of fact to be found by the jury." It is also said that, when the meaning is ambiguous, it is incumbent on the plaintiff "to show that the defendant intended to apply his remarks to the plaintiff." In *Le Fanu v. Malcomson*, 1 H. L. Cas. 637, which was an action for libel brought by copartners, the Lord Chancellor assumes that the plaintiff must prove "that the party writing the libel did intend to allude to them."

In Pub. Sts. c. 167, s. 94, the rule is laid down as applicable "to actions for written and printed, as well as oral slander," that if the meaning is not clear there must be innuendoes to make the words intelligible, "in the same sense in which they were spoken." *Chenery v. Goodrich*, 98 Mass. 224, 229, assumes that it must appear that the plaintiff was referred to in the publication, and *Young v. Cook*, 144 Mass. 38, is of similar import. *Odgers on Libel and Slander*, at page 127, discusses the topic, "Certainty as to person defamed." In *Commonwealth v. Kneeland*, 20 Pick. 206, 216, Chief Justice Shaw says that in actions of libel and slander it is the general rule that "the language shall be construed . . . in the sense in which the writer or speaker intended it." In *Smith v. Ashley*, 11 Met. 367, the necessity of proving the defendant's actual intention in regard to the person referred to was affirmed much more strongly than there is any occasion to affirm it, and perhaps more strongly than we should be prepared to affirm it in the present case. It was held that the publisher of a newspaper containing an article which he believed to be a fictitious narrative or mere fancy sketch was not liable to the plaintiff, although the article was libellous, and was intended by the writer to be applied to the plaintiff. The court said that in such a case, the writer alone was responsible.

In every action of this kind the fundamental question is, What is the meaning of the author of the alleged libel or slander, conveyed by the words used interpreted in the light of all the circumstances? The reason of this is obvious. Defamatory language is harmful only as it purports to be the expression of the thought of him who uses it. In determining the effect of a slander the questions involved are, What is the thought intended to be expressed, and how much credit should be given to him who expresses it? The essence of the wrong is the expression of what purports to be the knowledge or opinion of him who utters the defamatory words, or of some one else whose language he repeats. His meaning, to be ascertained in a proper way, is what gives character to his act, and makes it innocent or wrongful.

The damages depend chiefly upon the weight which is to be given to his expression of his meaning, and all the questions relate back to the ascertainment of his meaning.

In the present case we are concerned only with the meaning of the defendant in regard to the person to whom the language of the published article was to be applied, and the question to be decided is, How may his meaning legitimately be ascertained? Obviously, in the first place, from the language used; and in construing and applying the language, the circumstances under which it was written and the facts to which it relates are to be considered, so far as they can readily be ascertained by those who read the words, and who attempt to find out the meaning of the author in regard to the person of whom they were written. It has often been said that the meaning of the language is not necessarily that which it may seem to have to those who read it as strangers, without knowledge of facts and circumstances which give it color and aid in its interpretation, but that which it has when read in the light of events which have relation to the utterance or publication of it.

For the purposes of this case it may be assumed, in favor of the plaintiff, that if the language used in a particular case, interpreted in the light of such events, and circumstances attending the publication of it as could readily be ascertained by the public, is free from ambiguity in regard to the person referred to, and points clearly to a well known person, it would be held to have been published concerning that person, although the defendant should show that through some mistake of fact, not easily discoverable by the public, he had designated in his publication a person other than the one whom he intended to designate. It may well be held that where the language, read in connection with all the facts and circumstances which can be used in its interpretation, is free from ambiguity, the defendant will not be permitted to show that through ignorance or mistake he said something, either by way of designating the person, or making assertions about him, different from that which he intended to say; but his true meaning should be ascertained, if it can be, with the aid of such facts and circumstances attending the publication as may easily be known by those of the public who wish to discover it.

Whether the defendant should ever be permitted to state his undisclosed intention in regard to the person of whom the words are used, may be doubtful. If language purporting to be used of only one person would refer equally to either of two different persons of the same name, and if there were nothing to indicate that one was meant rather than the other, there is good reason for holding that the defendant's testimony in regard to his secret intention might be received, but perhaps such a case is hardly supposable. Odgers, in his book on Libel and Slander, at page 129, says: "So, if the words spoken or written, though plain in themselves, apply equally well to

more persons than one, evidence may be given both of the cause and occasion of publication, and of all the surrounding circumstances affecting the relation between the parties, and also any statement or declaration made by the defendant as to the person referred to." In *Regina v. Barnard*, 43 J. P. 127, when it was uncertain whether the libel referred to the complainant or not, and when the language was applicable to him, Lord Chief Justice Cockburn held the affidavit of the writer that he did not mean him, but some one else, to be a sufficient reason for refusing process. In *De Armond v. Armstrong*, 37 Ind. 35, evidence was received of what the witnesses understood in regard to the person referred to. In *Smart v. Blanchard*, 42 N. H. 137, it is stated that extrinsic evidence is to be received "to show that the defendant intended to apply his remarks to the plaintiff," when his meaning is doubtful. *Goodrich v. Davis*, 11 Met. 473, 480, 484, 485, and *Miller v. Butler*, 6 Cush. 71, are of similar purport. See also *Barwell v. Adkins*, 1 M. & G. 807; *Knapp v. Fuller*, 55 Vt. 311; *Commonwealth v. Morgan*, 107 Mass. 199, 201.

If the defendant's article had contained anything libellous against A. P. H. Hanson, there can be no doubt that he could have maintained an action against the defendant for this publication. The name used is not conclusive in determining the meaning of the libel in respect to the person referred to; it is but one fact to be considered with other facts upon that subject. Fictitious names are often used in libels, and names similar to that of the person intended, but differing somewhat from it. A. P. H. Hanson could have shown that the description of him by name, residence, and occupation was perfect, except in the use of the initials "H. P." instead of "A. P. H.," that the article referred to an occasion on which he was present, and gave a description of conduct of a prisoner, and of proceedings in court, which was correct in its application to him and to no one else. The internal evidence when applied to facts well known to the public would have been ample to show that the language referred to him, and not to the person whose name was used.

So, in the present suit, the court had no occasion to rely on the testimony of the writer as to the person to whom the language was intended to apply. The language itself, in connection with the publicly known circumstances under which it was written, showed at once that the article referred to A. P. H. Hanson, and that the name H. P. Hanson was used by mistake. As the evidence showed that the words were published of and concerning A. P. H. Hanson, the finding that they were not published of the plaintiff followed of necessity. The article was of such a kind that it referred, and could refer, to one person only; when that person was ascertained, it might appear that the publication as against him was or was not libellous, and his rights, if he brought a suit, would depend upon the finding in respect to that. No one else would have a cause of action, even if, by reason

of identity of name with that used in the publication, he might suffer some harm. For illustration, suppose a libel is written concerning a person described as John Smith of Springfield. Suppose there are five persons in Springfield of that name. The language refers to but one. When we ascertain by legitimate evidence to which one the words are intended to apply, he can maintain an action. The other persons of the same name cannot recover damages for a libel merely because of their misfortune in having a name like that of the person libelled. Or, if the defendant can justify by proving that the words were true, and published without malice, he is not guilty of a libel, even if, written of other persons of the same name of whose existence very likely he was ignorant, the words would be libellous; otherwise, one who has published that which by its terms can refer to but one person, and be a libel on him only, might be responsible for half a dozen libels on as many different persons, and one who has justifiably published the truth of a person might be liable to several persons of the same name of whom the language would be untrue. The law of libel has never been extended, and should not be extended, to include such cases.

Whether there should be a liability founded on negligence in any case when the truth is published of one to whom the words, interpreted in the light of accompanying circumstances easily ascertainable by those who read them, plainly apply; and where, by reason of identity of names, or similarity of names and description, a part of the public might think them applicable to another person of whom they would be libellous, is a question which does not arise on the pleadings in this case. So far as we are aware, no action for such a cause has ever been maintained. It is ordinarily to be presumed, although it may not always be the fact, that those who are enough interested in a person to be affected by what is said about him, will ascertain, if they easily can, whether libellous words which purport to refer to one of his name were intended to be applied to him or to some one else.

The question in this case, whether the words were published of and concerning the plaintiff, was one of fact on all the evidence. Unless it appears that the matters stated in the report would not warrant a finding for the defendant, there must be judgment for him, even if the finding of fact might have been the other way. We are of opinion that the finding was well warranted, and there must be,

*Judgment on the finding.*¹

HOLMES, J., delivered a dissenting opinion, with which MORTON and BARKER, JJ., agreed.

¹ See contra, *Taylor v. Hearst*, 107 Cal. 262, and authorities cited.

PEAKE *v.* OLDHAM.

King's Bench of England, Easter Term, 1775. 1 Cowp. 275.

ERROR from the Common Pleas in an action of slander, in which the plaintiff, now the defendant in error, declared that upon a colloquium of and concerning the death of one Daniel Dolly, the said Thomas Peake said to the said James Oldham: 1. "You are a bad man, and I am thoroughly convinced that you are guilty (meaning guilty of the murder of the said Dolly); and, rather than you should want a hangman, I would be your executioner." And being apprised that the said words were actionable, and being interrogated how he would prove what he said, answered that "he would prove it by Mrs. Harvey." 2. "You are a bad man, and I am thoroughly convinced that you are guilty (innuendo ut antea); and, rather than you should want a hangman, I would be your executioner." Being interrogated how he could prove the said James Oldham guilty of the murder of the said Daniel Dolly, he replied, "I can prove it by Mrs. Harvey." 3. "You are guilty (innuendo ut antea), and I will prove it." 4. "I am thoroughly convinced that you are guilty (meaning guilty of the death of Daniel Dolly); and, rather than you should go without a hangman, I will hang you." 5. "You are guilty" (innuendo, guilty of the murder of the said Dolly). By reason whereof, and to clear his character, the said James Oldham was obliged to procure, and did procure, an inquest in due form of law to be taken on the body of the said Daniel Dolly.

Upon not guilty pleaded, the jury found a general verdict upon all the counts, with £500 damages.

The defendant first moved for a new trial in C. B., which was refused; and afterwards in arrest of judgment, which rule was likewise discharged by Gould and Blackstone, JJ. (absentib. De Grey, C. J., and Nares, J.).

LORD MANSFIELD. It is much to be lamented that in any sort of action the mere inattention or slip of counsel, who are not always sufficiently attentive upon what count the verdict is taken, should be fatal to the party, contrary to the truth and justice of the case, the opinion of the judge upon the merits who tried the cause, and the meaning of the jury who pronounced the verdict. However, in civil cases the rule most certainly is settled, that where a verdict is taken generally, and any one count is bad, it vitiates the whole. It has always struck me that the rule would have been much more proper to have said, that if there is any one count to support the verdict, it shall stand good notwithstanding all the rest are bad. In criminal cases the rule is so; and one cannot, therefore, but lament that the reverse is adopted in civil cases; because it is as it were catching

justice in a net of form. However, this consideration will make the court lean against setting aside a verdict upon such an objection without very good reason, that is, without some apparent manifest defect; more especially in a case like the present, where the words have appeared to the jury to be so scandalous as to induce them to give a verdict with £500 damages, and where that verdict has received the sanction of the court in which the action was brought, by their refusing to grant a new trial upon an application to them for that purpose.

Let us consider, then, the grounds upon which the declaration in the present case is attempted to be impeached. Two of the counts are objected to, viz., the fourth and last. In the fourth it is said thus: "I am thoroughly convinced that you are guilty (innuendo that you are guilty of the death of the said Daniel Dolly); and, rather than you should go without a hangman, I will hang you." Upon this count it is argued that there are many innocent ways by which one man may occasion the death of another; therefore the words, "guilty of the death," do not in themselves necessarily import a charge of murder; and consequently, as no particular act is charged which in itself amounts to an imputation of a crime, the words are defectively laid. What! when the defendant tells the plaintiff "he is guilty of the death of a person," is not that a charge and imputation of a very foul and heinous kind? Saying that such a one is the cause of another's death, as in the case in 2 Bulstr. 10, 11, is very different; because a physician may be the cause of a man's death, and very innocently so; but the word "guilty" implies a malicious intent, and can be applied only to something which is universally allowed to be a crime. But the defendant does not rest here; on the contrary, in order to explain his meaning, he goes on and says, "and, rather than you should be without a hangman, I will hang you." These words plainly show what species of death the defendant meant, and therefore in themselves manifestly import a charge of murder.

The innuendo to the words of the next count is, that they mean "guilty of the murder of Daniel Dolly;" and the jury by their verdict have found the fact, namely, that such was the meaning of the defendant. But that is not all; for the jury find a special damage sustained by the plaintiff in being obliged, in consequence of the charge so made by the defendant, to have an inquest taken on the body of the deceased.

What! after a verdict, shall the court be guessing and inventing a mode, in which it might be barely possible for these words to have been spoken by the defendant, without meaning to charge the plaintiff with being guilty of murder? Certainly not. Where it is clear that words are defectively laid, a verdict will not cure them. But where, from their general import, they appear to have been spoken with a view to defame a party, the court ought not to be industrious

in putting a construction upon them different from what they bear in the common acceptation and meaning of them.

I am furnished with a case founded in strong sense and reason in support of this opinion; the name of it is *Ward v. Reynolds*, Pas. 12, Ann. B. R., and it is as follows: The defendant said to the plaintiff, "I know you very well; how did your husband die?" The plaintiff answered, "As you may, if it please God." The defendant replied, "No; he died of a wound you gave him." On not guilty, there was a verdict for the plaintiff; and on a motion in arrest of judgment the court held the words actionable; because, from the whole frame of them, they were spoken by way of imputation. And Lord Chief Justice Parker said: "It is very odd that after a verdict a court of justice should be trying whether there may not be a possible case in which words spoken, by way of scandal, might not be innocently said. Whereas, if that were in truth the case, the defendant might have justified, or the verdict would have been otherwise." So here, if shown to be innocently spoken, the jury might have found a verdict for the defendant; but they have put a contrary construction upon the words as laid, and upon the last count have found that the defendant meant a charge of murder. Therefore I am of opinion that the judgment of C. B. must be affirmed.

ASTON, WILLES, and ASHHURST, JJ., of the same opinion.

Judgment affirmed.

GAMBRILL v. SCHOOLEY.

Court of Appeals of Maryland, February, 1901. 93 Md. 48.

THE case is stated in the opinion.

PEARCE, J. This is an action of libel in which the appellee recovered a judgment for \$500 against the appellant in the Superior Court of Baltimore City. The plaintiff offered 5 prayers, all of which were granted; and the defendant offered 15 prayers, of which the 4th, 5th, 6th, 7th, 8th, 10th, 11th, 12th, 13th, and 14th were granted and his 1st, 2d, 3d, 9th, and 15th were rejected. A single exception was taken by the defendant to this ruling on the prayers, and the three following questions arise upon the exception: 1st. Whether the dictation of alleged libellous letters to defendant's private and confidential stenographer, their reduction by her to stenographic characters, and subsequent reduction to the characters of the alphabet by means of a typewriter, their signing by the defendant, and their transmission by his direction to the plaintiff, are in law a publication of such letters, where there is no communication of any of said letters in any manner to any other person. 2nd. Whether in such case, the

proper action is for libel or slander. 3rd. Whether, under the testimony in this case, the jury was properly instructed as to the allowance of exemplary or vindictive damages.

There were three counts in the declaration, upon three separate letters, and the case was tried on the general issue plea, there being no plea of justification alleging the truth of any of the charges contained in any of the letters, either in whole or in part. Of the libellous character of each of these letters there can be no question, but the letter in the 3d count was shown by the uncontradicted testimony to be wholly in the handwriting of defendant, and never to have been read or exhibited to any one but the plaintiff; and the jury was properly instructed by the defendant's 4th prayer that there could be no recovery on the 3d count.

It was very earnestly and ably argued by the appellant's counsel that, as the two letters in the 1st and 2d counts were not *otherwise published* than as above stated, there was no actionable publication of either letter, so as to make either one a libel, and consequently, that the Court erred in granting the plaintiff's $3\frac{1}{2}$ and $4\frac{1}{2}$ prayers, and in rejecting the defendant's 1st, 2d, and 3d prayers, which, respectively, raised the contentions of the parties on this point.

This is certainly an important question, and one which has never before been raised in this Court. Indeed, the appellant's counsel states in his brief, that it has never been expressly ruled upon in America, though he has referred us to a case in the Appellate Division of the Supreme Court of New York (*Owen v. Ogilvie Pub. Co.*, 32 App. Div. 465), which he contends supports his position. The appellee's counsel has submitted a very full brief, but has referred us to no American case upon this point. If such authorities existed, we may safely assume they would not have escaped the well-known diligence of counsel, and we have found none such in our own examination; but the principles and considerations upon which this question should be decided are not, in our opinion, difficult to determine, and the instructive English cases which have been cited are in accord with these principles and considerations.

Before considering the argument of the appellant, it will be well to recall the definition of publication, given by competent authority, as necessary to constitute slander a¹ libel. Mr. Odgers, in his work on Libel and Slander, page 150, defines publication as applicable either to slander or libel, as "the communication of the defamatory words to some third person;" and on page 1, he says, "False defamatory words, if written *and published*, constitute a libel; if spoken, a slander." It is obvious however, that publication is essential to either, and that the words "if published," though not repeated in the latter clause, must be understood as if repeated. For to shout aloud defamatory words on a desert moor, where no one hears them, is not

¹ Sic, for or.

a publication of the slander, nor is the utterance of such words in a foreign language, a publication, if no one present understands their meaning. *Id.* 151. For the same reason, very clearly, if one should write a defamatory letter, and hand it to a third person, to be read, who does not understand and cannot read that language, there would be no publication of the libel. In *Pullman v. Walter Hill & Co.*, [1891], 1 Q. B. 529, Lopes, L. J., defines publication of a libel in the exact words cited from Mr. Odgers, and in the same case, Lord Esher, Master of the Rolls, defines it, more fully, and perhaps with more technical accuracy, as "the making known the defamatory matter, after it has been written, to some person other than the person to whom it is written." Appellant's counsel, in his brief, says, with equal clearness and accuracy: "Publication, in the law of libel and slander, means the transmission of ideas and thoughts to the perception of a person, other than the parties to the suit."

Bearing in mind these definitions and simple illustrations of what is, and what is not, publication, it will be seen that the argument that there has been no actionable publication in this case, divides itself into two branches. The theory of the first branch is, that while there was in fact a physical or mechanical reception by the stenographer of the thoughts expressed by the appellant, that such reception was instantaneous only, and merely sufficient for their reduction to written characters; but that there was no comprehension, and no lodgment, of their meaning in the brain of the recipient, who acted as a mere phonograph, and whose function in that regard was not a mental, but purely a mechanical process; so that there was no such perception as is requisite to constitute publication. This theory is both ingenious and subtle, but we cannot be persuaded it is sound. We cannot doubt that the dictation to Miss Willis, though taken down in stenographic characters, produced in her mind as full and complete perception of the thoughts of the appellant as a slower dictation, for the purpose of reduction to ordinary characters, would have produced in the mind of one not a stenographer. If this were not so, there could be no assurance that there would be an accurate reproduction of the matter dictated, such as common knowledge gives assurance of from any skillful stenographer. A communication, therefore, to a stenographer must be regarded precisely as a communication to an ordinary amanuensis, and as establishing all that is ordinarily necessary to constitute publication.

The second branch of the argument is, that in view of the fact that Miss Willis was the private and confidential stenographer of the defendant, and in view of the almost universal employment, in this country, of such stenographers, and the necessity for such employment consequent upon the demands of business, a communication to such a stenographer should be made an exception to the general rule, and be held not to be an actionable publication. But we cannot adopt

this view. Apart from any precedent or authority, we can perceive no good reason why such an exception should be made to the rule. Neither the prevalence of any business customs or methods, nor the pressure of business which compels resort to stenographic assistance, can make that legal which is illegal, nor make that innocent which would otherwise be actionable. Nor can the fact that the stenographer is under contractual or moral obligation to regard all his employer's communications as confidential alter the reason of the matter. This defence was made in *Williamson v. Freer*, L. R. 9 C. P. 393, where it was held that the unnecessary transmission by a post-office telegram, of libellous matter, which would have been privileged, if sent in a sealed letter, avoids the privilege; Lord Coleridge, C. J., saying: "Although the clerks are prohibited under severe penalties from disclosing the contents of telegrams passing through their hands, still there is disclosure to them." In *Pullman v. Hill*, already cited, the exact question here presented was decided. There, the letter containing the defamatory matter was dictated by the managing director of a corporation to a clerk, who took down the words in shorthand, and then wrote them out fully by means of a typewriting machine, and the letter thus written was copied by an office boy in a letter-press book. When it reached its destination, it was, in the ordinary course of business, opened by a clerk of the plaintiff; and it was held that the letter must be taken to have been published both to the typewriter and to the copy-press boy, as well as to the plaintiff's clerk. Lord Esher, M. R., in the course of his opinion, said: "I do not think that the necessities or the luxuries of business can alter the law of England. If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself." Lopes, L. J., said: "It is said business cannot be carried on if merchants may not employ their clerks to write letters for them in the ordinary course of business. I think the answer to this is very simple. I have never yet heard that it is in the usual course of a merchant's business to write letters containing defamatory statements. If a merchant has occasion to write such a letter, he must write it himself and copy it himself, or he must take the consequences." Kay, L. J., said: "The consequence of such an alteration in the law of libel would be this, that any merchant or solicitor who desired to write a libel concerning any person would be privileged to communicate the libel to any agent he pleased if it was in the ordinary course of his business. That would be an extraordinary alteration of the law, and it would enable people to defame others to an alarming extent." We were referred to *Boxsius v. Goblet Freres* (1894), 1 Q. B. Div. 843, as evincing a disposition to qualify the rule in *Pullman v. Hill*, but we cannot discover such disposition, and if we could, we should not be inclined to follow it. There the libellous letter was dictated by a

solicitor, acting in behalf of and at the direction of his client, and copies were made as in the case mentioned. The court distinguished the case very clearly from *Pullman v. Hill*, holding, through two of the same judges, that the solicitor owed to his client the duty to act on his instructions, and that if the solicitor had communicated directly with the plaintiff, the communication would have been privileged, and that he could discharge that duty, as he did other business of the office, in the ordinary way, without losing the privilege. But there was no question of privilege in *Pullman v. Hill*, and there is none here, as the appellant owed no duty in the matter to any one. The typewriter had no conceivable interest in hearing or seeing the letters, and there could be, therefore, no privilege between her and the appellant. In *Owen v. Ogilvie Pub. Co.*, 32 App. Div. 465, the alleged libellous letter relating to the business of a corporation, was dictated by its manager to its stenographer, who wrote it out in shorthand, copied it upon a typewriter, and mailed it. The manager and stenographer were held to be servants of a common master, and to be engaged in the performance of duties which their respective employments required, and that under such circumstances the stenographer should not be regarded as a third person, in the sense that either the dictation or the subsequent reading should be regarded as a publication by the corporation. The English cases mentioned were not referred to, but the Court nevertheless said: "It may be that the dictation to the stenographer and her reading of the letter would constitute a publication of the same by the person dictating it, if the relation existing between the manager and the copyist was that of master and servant, and the letter be held not to be privileged." Upon the exact question here involved, the above extract from the opinion in that case seems to afford slender support to the appellant's contention, and what it does decide is not in accord with the views expressed by this court in *Carter v. Machine Co.*, 51 Md. 294, in which Judge Alvey said that it would seem to be now clear, whatever may have been the former state of judicial opinion upon the subject, that corporations are liable for all acts, whether willful or malicious, of their agents or servants, done in the course of their employment, and that actions for such injuries, including libel, could be sustained against corporations in any case where, under similar circumstances, such actions could be sustained against individuals for the acts of their servants. It is true that that case was not an action for libel, but it sufficiently indicates that this Court would not be astute to find reasons for relieving corporations from liability in libel cases for want of technical publication. We think, for the reasons given above, that the defendant's 1st prayer was properly rejected.

Apart from the question of publication, the defendant's 2d and 3d prayer raise the additional question whether, under the pleadings in this case, the action must not have been for slander, instead of libel,

but we have no difficulty on this point. We have no doubt that the dictation of these letters to the stenographer was the publication of a slander, for which, if nothing further had been done by either, an action of slander could have been maintained, but we have no more doubt that the stenographic notes, the typewritten copy and the letterpress copy constituted the publication of a libel, and that either slander or libel could be maintained, as the appellee should elect. This conclusion, we think, necessarily follows from what we have already said, without more formally stating the reasons, and our conclusion is not shaken by Mr. Odgers' criticism of the decision in *Pullman v. Hill* upon the form of action, to be found on page 174 of his last edition. We therefore think the defendant's 2d and 3d prayers were properly rejected, not only for the reasons now given, but for those applicable to defendant's 1st prayer, and that the plaintiff's 3½ and 4½ prayers were for the same reasons properly granted. The plaintiff's 1st and 2d prayers were not questioned at the argument and are so clearly correct as to require no notice. The plaintiff's 5th prayer was also properly granted for reasons which will appear when we come to consider the defendant's 9th prayer.

The defendant's 9th prayer was properly rejected, because it precluded the jury from including in their verdict any allowance whatever for exemplary or punitive damages.¹ Whenever the words charged in an action for slander or libel are actionable per se, as in this case, the damages are exclusively within the sound discretion of the jury. 13 Am. & Eng. Enc. Law, 432; *Tripp v. Thomas*, 3 Barn. & C. 427; *Marks v. Jacobs*, 76 Ind. 216; *Nolan v. Traber*, 49 Md. 470; *Negley v. Farrow*, 60 Md. 148. Whether exemplary damages shall be given or not, is in all cases for the jury. *Jerome v. Smith*, 48 Vt. 230; *Boardman v. Goldsmith*, Id. 403. The assessment of damages is peculiarly the province of a jury in an action for libel. The damages in such an action are not limited to the amount of pecuniary loss which the plaintiff is able to prove. *Davis v. Shepstone*,² 11 App. Cas. 191, per Lord Herschell. The jury must not be restricted by a direction not to give such damages. *De Vaughn v. Heath*, 37 Ala. 595. The plaintiff's 5th prayer is in accord with these principles and was therefore properly granted. We cannot, however, avoid the conclusion that there was error in the rejection of the defendant's 15th prayer, which asked that the jury be instructed, if the defendant honestly and in good faith believed the statements contained in the letters to be true, and had grounds for such belief sufficient to satisfy an ordinarily prudent and cautious man that such statements were true, then the jury might take into consideration all the circumstances of the case, and in the exercise of their discretion, award to the plaintiff nominal damages merely. This prayer is very carefully guarded

¹ See Mass. Rev. Laws, ch. 173, § 92.

² *Post*, p. 476.

by the requirement to find honest belief of the truth of the charges, and of reasonable ground for such belief, and in its conclusion is substantially the converse of the proposition contained in the plaintiff's 5th prayer, which we have said was properly granted. By the rejection of the defendant's 15th prayer, the jury were practically told they must give exemplary damages, and were absolutely refused the discretion to withhold them. But in no case has a plaintiff any legal right to exemplary damages. Such damages depend upon the case and evidence and finding of the jury. *Jerome v. Smith*, supra. Where there is evidence of circumstances sufficient to uphold a verdict for exemplary damages, the question whether they shall be given or not is one for the jury. *Boardman v. Goldsmith*, 48 Vt. 403. And it is error to instruct them they must give exemplary damages. *Sedg. Dam.* 333; *Hawk v. Ridgway*, 33 Ill. 472. The words used here being actionable per se, although there was no proof of actual and substantial damages sustained by the publications to Miss Willis of the two letters, the jury could not properly have been deprived of their discretion to give exemplary damages, if they found malice, nor could they, on the other hand, either by the granting of an erroneous instruction or the rejection of a proper one, be deprived of their discretion to refuse to award exemplary damages if they found no malice. For the error in the rejection of the defendant's 15th prayer, it will be necessary to reverse the judgment that a new trial may be had.

*Judgment reversed, with costs to appellant,
above and below, and new trial awarded.*

EMMENS v. POTTLE.

Court of Appeal of England, 1885. 16 Q. B. D. 354.

APPEAL from the judgment of Wills, J., at the trial of an action with a jury to recover damages for an alleged libel.

The plaintiff by his statement of claim¹ alleged that "the defendants on or about the 11th of February, 1885, at Nos. 14 and 15 Royal Exchange, in the city of London, did falsely and maliciously publish of the plaintiff, in the form of an article appearing in the newspaper known as *Money*, bearing date the 11th of February, 1885, by the sale thereof by their servants or agents, at such time and places aforesaid, for the defendants' benefit, to one Ernest Clarke," certain words set out in the statement of claim. The plaintiff alleged that in consequence of the premises he had been and was greatly injured in his credit and reputation, and he claimed £5,000 damages.

By the statement of defence (par. 1) the defendants denied that

¹ Substitute for the common-law declaration.

they had published the alleged libel. And further and alternately (par. 2) the defendants said that "they are news-vendors, carrying on a large business at 14 and 15 Royal Exchange, in the city of London, and as such news-vendors, and not otherwise, sold copies of the said periodical called *Money* in the ordinary course of their said business, and without any knowledge of its contents, which is the alleged publication."

The plaintiff by his reply joined issue on the first paragraph of the defence. And as to the second paragraph of the defence the plaintiff said that "the allegations therein contained are bad in substance and in law, on the ground that, even if the defendants sold copies of the said periodical without any knowledge of their contents and in the ordinary course of their business, as alleged in their defence, still, inasmuch as the defendants sold the said copies as news-vendors for reward in that behalf, the said allegations disclose no answer to the plaintiff's claim."

The jury in answer to questions put to them by the judge found that "the defendants did not nor did either of them know that the newspapers at the time they sold them contained libels on the plaintiff; that it was not by negligence on the defendants' part that they did not know there was any libel in the newspapers; and that the defendants did not know that the newspaper was of such a character that it was likely to contain libellous matter, nor ought they to have known so." The judge directed the jury to assess the damages provisionally, and the judge then ordered judgment to be entered for the defendants, with costs.

The plaintiff appealed.

LORD ESHER, M. R. I am afraid it will not be much satisfaction to the plaintiff, as I am going to decide against him, for me to say that it would be impossible for any one to have argued a case in better form or with better logic than he has argued his own case.

The principle is no doubt a very important one, and one well worthy of consideration. I do not intend to lay down any general rule as to what will absolve from liability for a libel persons who stand in the position of these defendants. But it is a material element in their position that the jury have found in their favor as they have done. I agree that the defendants are *prima facie* liable. They have handed to other people a newspaper in which there is a libel on the plaintiff. I am inclined to think that this called upon the defendants to show some circumstances which absolve them from liability, not by way of privilege, but facts which show that they did not publish the libel.

We must first consider what the position of the defendants was. The proprietor of a newspaper, who publishes the paper by his servants, is the publisher of it, and he is liable for the acts of his servants. The printer of the paper prints it by his servants, and therefore he

is liable for a libel contained in it. But the defendants did not compose the libel on the plaintiff; they did not write or print it; they only disseminated that which contained the libel. The question is whether, as such disseminators, they published the libel. If they had known what was in the paper, whether they were paid for circulating it or not, they would have published the libel, and would have been liable for so doing. That, I think, cannot be doubted. But here, upon the findings of the jury, we must take it that the defendants did not know that the paper contained a libel.

I am not prepared to say that it would be sufficient for them to show that they did not know of the particular libel. But the findings of the jury make it clear that the defendants did not publish the libel. Taking the view of the jury to be right, that the defendants did not know that the paper was likely to contain a libel, and still more that they ought not to have known this, which must mean that they ought not to have known it, having used reasonable care — the case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel. That being so, I think the defendants are not liable for the libel.

If they were liable, the result would be that every common carrier who carries a newspaper which contains a libel would be liable for it, even if the paper were one of which every man in England would say that it was not likely to contain a libel. To my mind the mere statement of such a result shows that the proposition from which it flows is unreasonable and unjust. The question does not depend on any statute, but on the common law, and in my opinion any proposition the result of which would be to show that the common law of England is wholly unreasonable and unjust cannot be part of the common law of England. I think therefore that upon the findings of the jury the judgment for the defendants is right.

BOWEN, L. J. The jury have found as a fact that the defendants were innocent carriers of that which they did not know contained libellous matter, and which they had no reason to suppose was likely to contain libellous matter. A newspaper is not like a fire; a man may carry it about without being bound to suppose that it is likely to do an injury. It seems to me that the defendants are no more liable than any other innocent carrier of an article which he has no reason to suppose likely to be dangerous. But I by no means intend to say that the vendor of a newspaper will not be responsible for a libel contained in it if he knows, or ought to know, that the paper is one which is likely to contain a libel.

COTTON, L. J., concurred.

Appeal dismissed.

BROOKER *v.* COFFIN.

Supreme Court, New York, November, 1809. 5 Johns. 188.

THIS was an action for slander. The declaration contained two counts. The first charged that on the 1st of February, 1808, at Schaghticoke, in the county of Rensselaer, &c., for that whereas the plaintiff being a person of good name, &c., the defendant falsely and maliciously did speak and utter of and concerning the plaintiff the following false, scandalous, and defamatory words: "She (meaning the plaintiff) is a common prostitute, and I can prove it." The second count charged that the defendant afterwards, to wit, on the day and year aforesaid, at the place aforesaid, in a certain other discourse, &c., did falsely and maliciously speak and utter the following false, scandalous, and defamatory words, to wit, "She (meaning the plaintiff) was hired to swear the child on me (meaning the plaintiff was hired falsely and maliciously to swear a certain child on the defendant). She (meaning the plaintiff) has had a child before this (meaning before this child, or the child which the said defendant had before said the said Nancy had been hired to swear on him), when she went to Canada (meaning a certain time when the plaintiff had been at Canada). She (meaning the plaintiff) would come damned nigh going to the State prison" (meaning that the said plaintiff was guilty of such enormous and wicked crimes as would, if punished according to the laws and statutes in such cases made and provided, condemn her to infamous punishment in the State prison). Whereas, in truth, &c.

There was a general demurrer to the first count, and a special demurrer to the second count and joinder.

SPENCER, J. The first count is for these words, "she is a common prostitute, and I can prove it;" and the question arises, whether speaking these words gives an action without alleging special damages. By the statute (1 R. L. 124), common prostitutes are adjudged disorderly persons, and are liable to commitment by any justice of the peace, upon conviction, to the bridewell or house of correction, to be kept at hard labor for a period not exceeding sixty days, or until the next general sessions of the peace. It has been supposed that, therefore, to charge a woman with being a common prostitute, was charging her with such an offence as would give an action for the slander. The same statute which authorizes the infliction of imprisonment on common prostitutes, as disorderly persons, inflicts the same punishment for a great variety of acts, the commission of which renders persons liable to be considered disorderly; and to sustain this action would be going the whole length of saying, that every one charged with any of the acts prohibited by that statute would be entitled to maintain

an action for defamation. Among others, to charge a person with pretending to tell fortunes, would, if this action is sustained, be actionable. Upon the fullest consideration, we are inclined to adopt this as the safest rule, and one which, as we think, is warranted by the cases. In case the charge, if true, will subject the party charged, to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable; and Baron Comyns considers the test to be whether the crime is indictable or not. 1 Com. tit. Action on the Case for Defamation, F. 20. There is not, perhaps, so much uncertainty in the law upon any subject, as when words shall be in themselves actionable. From the contradiction of cases, and the uncertainty prevailing on this head, the court think they may, without overleaping the bounds of their duty, lay down a rule which will conduce to certainty, and they therefore adopt the rule I have mentioned as the criterion. In our opinion, therefore, the first count in the declaration is defective.

The second count is for saying of the plaintiff, "she was hired to swear the child on me; she has had a child before this when she went to Canada; she would come damned near going to the State prison." These words are laid as spoken at one time; if, then, any of them are actionable, it is sufficient. The innuendoes enlarge their meaning, and are not justified. One of them avers that the defendant meant that the plaintiff was hired, falsely and maliciously, to swear the child on the defendant; and another innuendo, in explaining the words, "she would come damned near going to State prison," alleges that the defendant meant that the plaintiff was guilty of such enormous crimes as would, if punished according to the laws, &c., condemn her to infamous punishment in the State prison. Now I do not perceive that the charge at all warrants the inference that the plaintiff had been guilty of perjury; and the cases of *Hopkins v. Beedle*, 1 Caines, 347; *Stafford v. Green*, 1 Johns. Rep. 505; and *Ward v. Clark*, 2 Johns. Rep. 11, are authorities against sustaining this case.

The defendant must therefore have judgment.

POLLARD v. LYON.

Supreme Court of the United States, October, 1875. 91 U. S. 225.

THE case is stated in the opinion.

MR. JUSTICE CLIFFORD. Words both false and slanderous, it is alleged, were spoken by the defendant of the plaintiff; and she sues in an action on the case for slander to recover damages for the injury to her name and fame.

Controversies of the kind, in their legal aspect, require pretty careful examination; and, in view of that consideration, it is deemed proper to give the entire declaration exhibited in the transcript, which is as follows:—

“That the defendant, on a day named, speaking of the plaintiff, falsely and maliciously said, spoke, and published of the plaintiff the words following, ‘I saw her in bed with Captain Denty.’ That at another time, to wit, on the same day, the defendant falsely and maliciously spoke and published of the plaintiff the words following, ‘I looked over the transom-light and saw Mrs. Pollard,’ meaning the plaintiff, ‘in bed with Captain Denty;’ whereby the plaintiff has been damaged and injured in her name and fame, and she claims damages therefor in the sum of ten thousand dollars.”

Whether the plaintiff and defendant are married or single persons does not appear; nor is it alleged that they are not husband and wife, nor in what respect the plaintiff has suffered loss beyond what may be inferred from the general averment that she had been damaged and injured in her name and fame.

Service was made, and the defendant appeared and pleaded the general issue; which being joined, the parties went to trial; and the jury, under instructions of the court, found a verdict in favor of the plaintiff for the whole amount claimed in the declaration. None of the other proceedings in the case, at the special term, require any notice, except to say that the defendant filed a motion in arrest of judgment, on the ground that the words set forth in the declaration are not actionable, and because the declaration does not state a cause of action which entitles the plaintiff to recover; and the record shows that the court ordered that the motion be heard at general term in the first instance. Both parties appeared at the general term, and were fully heard; and the court sustained the motion in arrest of judgment, and decided that the declaration was bad in substance. Judgment was subsequently rendered for the defendant, and the plaintiff sued out the present writ of error.

Definitions of slander will afford very little aid in disposing of any question involved in this record, or in any other, ordinarily arising in such a controversy, unless where it becomes necessary to define the difference between oral and written defamation, or to prescribe a criterion to determine, in cases where special damage is claimed, whether the pecuniary injury alleged naturally flows from the speaking of the words set forth in the declaration. Different definitions of slander are given by different commentators upon the subject; but it will be sufficient to say that oral slander, as a cause of action, may be divided into five classes, as follows: (1) Words falsely spoken of a person which impute to the party the commission of some criminal offence involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2) Words falsely

spoken of a person which imputes that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society; or (3) Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. (4) Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. (5) Defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage.

Two propositions are submitted by the plaintiff to show that the court below erred in sustaining the motion in arrest of judgment, and in deciding that the declaration is bad in substance: (1) That the words set forth in the declaration are in themselves actionable, and consequently that the plaintiff is entitled to recover, without averring or proving special damage. (2) That if the words set forth are not actionable per se, still the plaintiff is entitled to recover under the second paragraph of the declaration, which, as she insists, contains a sufficient allegation that the words spoken of her by the defendant were, in a pecuniary sense, injurious to her, and that they did operate to her special damage.

Certain words, all admit, are in themselves actionable, because the natural consequence of what they impute to the party is damage, as if they import a charge that the party has been guilty of a criminal offence involving moral turpitude, or that the party is infected with a contagious distemper, or if they are prejudicial in a pecuniary sense to a person in office or to a person engaged as a livelihood in a profession or trade; but in all other cases the party who brings an action for words must show the damage he or she has suffered by the false speaking of the other party.

Where the words are intrinsically actionable, the inference or presumption of law is that the false speaking occasions loss to the plaintiff; and it is not necessary for the plaintiff to aver that the words alleged amount to the charging of the described offence, for their actionable quality is a question of law, and not of fact, and will be collected by the court from the words alleged and proved, if they warrant such a conclusion.

Unless the words alleged impute the offence of adultery, it can hardly be contended that they impute any criminal offence for which the party may be indicted and punished in this district; and the court is of the opinion that the words do not impute such an offence, for the reason that the declaration does not allege that either the plaintiff or the defendant was married at the time the words were spoken. Support to that view is derived from what was shown at the argument, that fornication as well as adultery was defined as an offence by the provincial statute of the 3d of June, 1715, by which

it was enacted that persons guilty of those offences, if convicted, should be fined and punished as therein provided. Kilty's Laws, ch. xxvii., sects. 2, 3.

Beyond all doubt, offences of the kind involve moral turpitude; but the second section of the act which defined the offence of fornication was, on the 8th of March, 1785, repealed by the legislature of the State. 2 Kilty, ch. xlvii., sect. 4.

Sufficient is remarked to show that the old law of the province defining such an offence was repealed by the law of the State years before the Territory, included within the limits of the city, was ceded by the State to the United States; and inasmuch as the court is not referred to any later law passed by the State, defining such an offence, nor to any act of Congress to that effect passed since the cession, our conclusion is that the plaintiff fails to show that the words alleged impute any criminal offence to the plaintiff for which she can be indicted and punished.

Suppose that is so: still the plaintiff contends that the words alleged, even though they do not impute any criminal offence to the plaintiff, are nevertheless actionable in themselves, because the misconduct which they *do* impute is derogatory to her character, and highly injurious to her social standing.

Actionable words are doubtless such as naturally imply damage to the party; but it must be borne in mind that there is a marked distinction between slander and libel, and that many things are actionable when written or printed and published which would not be actionable if merely spoken, without averring and proving special damage. *Clement v. Chivis*, 9 Barn. & Cress. 174; *McClurg v. Ross*, 5 Binn. 219.

Unwritten words, by all, or nearly all, the modern authorities, even if they impute immoral conduct to the party, are not actionable in themselves, unless the misconduct imputed amounts to a criminal offence, for which the party may be indicted and punished. Judges as well as commentators, in early times, experienced much difficulty in extracting any uniform definite rule from the old decisions in the courts of the parent country to guide the inquirer in such an investigation; nor is it strange that such attempts have been attended with so little success, as it is manifest that the incongruities are quite material, and, in some respects, irreconcilable. Nor are the decisions of the courts of that country, even of a later period, entirely free from that difficulty.

Examples both numerous and striking are found in the reported decisions of the period last referred to, of which only a few will be mentioned. Words which of themselves are actionable, said Lord Holt, must either endanger the party's life, or subject him to infamous punishment; that it is not enough that the party may be fined and imprisoned, for a party may be fined and imprisoned for

a common trespass, and none will hold that to say one has committed a trespass will bear an action; and he added that at least the thing charged must "in itself be scandalous." *Ogden v. Turner*, 6 Mod. 104.

Viewed in any proper light, it is plain that the judge who gave the opinion in that case meant to decide that words, in order that they may be actionable in themselves, must impute to the party a criminal offence affecting the social standing of the party, for which the party may be indicted and punished.

Somewhat different phraseology is employed by the court in the next case to which reference will be made. *Onslow v. Horne*, 3 Wil. 186. In that case, De Grey, C. J., said the first rule to determine whether words spoken are actionable is, that the words must contain an express imputation of some crime liable to punishment, some capital offence or other infamous crime or misdemeanor, and that the charge must be precise. Either the words themselves, said Lord Kenyon, must be such as can only be understood in a criminal sense, or it must be shown by a colloquium in the introductory part that they have that meaning; otherwise they are not actionable. *Holt v. Scholefield*, 6 Term, 694.

Separate opinions were given by the members of the court in that case; and Mr. Justice Lawrence said that the words must contain an express imputation of some crime liable to punishment, some capital offence or other infamous crime or misdemeanor; and he denied that the meaning of words not actionable in themselves can be extended by an innuendo. 4 Co. 17 b.

Prior to that, Lord Mansfield and his associates held that words imputing a crime are actionable, although the words describe the crime in vulgar language, and not in technical terms; but the case does not contain an intimation that words which do not impute a crime, however expressed, can ever be made actionable by a colloquium or innuendo. *Colman v. Godwin*, 3 Doug. 90; *Woolnoth v. Meadows*, 5 East, 463.

Incongruities, at least in the forms of expression, are observable in the cases referred to, when compared with each other; and when those cases, with others not cited, came to be discussed and applied in the courts of the States, the uncertainty as to the correct rule of decision was greatly augmented. Suffice it to say, that it was during the period of such uncertainty as to the rule of decision when a controversy bearing a strong analogy to the case before the court was presented for decision to the Supreme Court of the State of New York, composed, at that period, of some of the ablest jurists who ever adorned that bench.

Allusion is made, in the opinion given by Judge Spencer, to the great "uncertainty in the law upon the subject;" and, having also adverted to the necessity that a rule should be adopted to remove

that difficulty, he proceeds, in the name of the court, to say, "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject the party to an infamous punishment, then the words will be in themselves actionable;" and that rule has ever since been followed in that State, and has been very extensively adopted in the courts of other States. *Brooker v. Coffin*, 5 Johns. 190;¹ 1 Am. Lead Cas. (5th ed.) 98.

When he delivered the judgment in that case, he was an associate justice of the court; Chancellor Kent being the chief justice, and participating in the decision. Fourteen years later, after he became chief justice of the court, he had occasion to give his reasons somewhat more fully for the conclusion then expressed. *Van Ness v. Hamilton*, 19 Johns. 367.

On that occasion he remarked, in the outset, that there exists a decided distinction between words spoken and written slander; and proceeded to say, in respect to words spoken, that the words must either have produced a temporal loss to the plaintiff by reason of special damage sustained from their being spoken, or they must convey a charge of some act criminal in itself and indictable as such, and subjecting the party to an infamous punishment, or they must impute some indictable offence involving moral turpitude; and, in our judgment, the rule applicable in such a case is there stated with sufficient fulness, and with great clearness and entire accuracy.

Controverted cases involving the same question, in great numbers, besides the one last cited, have been determined in that State by applying the same rule, which, upon the fullest consideration, was adopted in the leading cases, — that in case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject the party to an infamous punishment, then the words will be in themselves actionable.

Attempt was made by counsel in the case of *Widrig v. Oyer*, 13 Johns. 124, to induce the court to modify the rule by changing the word "or" into "and;" but the court refused to adopt the suggestion, and repeated and followed the rule in another case reported in the same volume. *Martin v. Stillwell*, 13 Id. 275. See also *Gibbs v. Dewey*, 5 Cowen, 503; *Alexander v. Dewey*, 9 Wend. 141; *Young v. Miller*, 3 Hill, 22; in all of which the same rule is applied.

Other cases equally in point are also to be found in the reported decisions of the courts of that State, of which one or two more only will be referred to. *Bissell v. Cornell*, 24 Wend. 354. In that case, the words charged were fully proved; and the defendant moved for a nonsuit, upon the ground that the words were not in themselves actionable; but the circuit judge overruled the motion, and the defendant excepted. Both parties were subsequently heard in the Supreme Court of the State, Nelson, C. J., giving the opinion of the

¹ Ante, p. 436.

court, in which it was held that the words were actionable; and the reason assigned for the conclusion is, that the words *impute an indictable offence involving moral turpitude*.

Defamatory words to be actionable per se, say that court, must impute a crime involving moral turpitude punishable by indictment. It is not enough that they impute immorality or moral dereliction *merely*, but the offence charged must be also indictable. At one time, said the judge delivering the opinion, it was supposed that the charge should be such, as, if true, would subject the party charged to an infamous punishment; but the Supreme Court of the State refused so to hold. *Widrig v. Oyer*, 13 Johns. 124; *Wright v. Page*, 3 Keyes, 582.

Subject to a few exceptions, it may be stated that the courts of other States have adopted substantially the same rule, and that most of the exceptional decisions are founded upon local statutes defining fornication as a crime, or providing that words imputing incontinence to an unmarried female shall be construed to impute to the party actionable misconduct.

Without the averment and proof of special damage, says Shaw, C. J., the plaintiff, in an action on the case for slander, must prove that the defendant uttered language the effect of which was to charge the plaintiff with some crime or offence punishable by law. *Dunnell v. Fiske*, 11 Met. 552.

Speaking of actions of the kind, Parker, C. J., said that words imputing crime to the party against whom they are spoken, which, if true, would expose him to disgraceful punishment, or imputing to him some foul and loathsome disease which would expose him to the loss of his social pleasures, are actionable, without any special damage; while words perhaps equally offensive to the individual of whom they are spoken, but which impute only some defect of moral character, are not actionable, unless a special damage is averred, or unless they are referred, by what is called a colloquium, to some office, business, or trust which would probably be injuriously affected by the truth of such imputations. *Chaddock v. Briggs*, 13 Mass. 252.

Special reference is made to the case of *Miller v. Parish*, 8 Pick. 385, as authority to support the views of the plaintiff; but the court here is of the opinion that it has no such tendency. What the court in that case decided is, that whenever an offence is imputed, which, if proved, may subject the party to punishment, though not ignominious, but which brings disgrace upon the party falsely accused, such an accusation is actionable; which is not different in principle from the rule laid down in the leading case, — that if the charge be such, that if true, it will subject the party falsely accused to an indictment for a crime involving moral turpitude, then the words will be in themselves actionable.

Early in her history, the legislature of Massachusetts defined the

act of fornication as a criminal offence, punishable by a fine, and which may be prosecuted by indictment; and, if the person convicted does not pay the fine, he or she may be committed to the common jail or to the house of correction. None of the counts in that case contained an averment of special damage; but the court held, that, inasmuch as the words alleged imputed a criminal offence which subjected the party to punishment involving disgrace, the words were actionable; and it is not doubted that the decision is correct. Exactly the same question was decided by the same court in the same way twenty-five years later. *Kenney v. Laughlin*, 3 Gray, 5;¹ 1 Stat. Mass. 1786, 293. Other State courts, where the act of fornication is defined by statute as an indictable offence, have made similar decisions; but such decisions do not affect any question involved in this investigation. *Vanderip v. Roe*, 23 Penn. St. 182; 1 Am. Lead Cas. (5th ed.) 103; *Simons v. Carter*, 32 N. H. 459; *Sess. Laws (Penn. 1860)*, 382; *Purdon's Dig.* 1824, 313.

That the words uttered import the commission of an offence say the court, cannot be doubted. It is the charge of a crime punishable by law, and of a character to degrade and disgrace the plaintiff, and exclude her from society. Though the imputation of crime, said Bigelow, J., is a test, whether the words spoken do amount to legal slander, yet it does not take away their actionable quality if they are so used as to indicate that the party has suffered the penalty of the law, and is no longer exposed to the danger of punishment. *Krebs v. Oliver*, 12 Gray, 242; *Fowler v. Dowdney*, 2 M. & Rob. 119.

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Much discussion of the cases decided in the Supreme Court of Pennsylvania is quite unnecessary, as we have the authority of that court for saying that the leading cases establish the principle, that words spoken of a private person are only actionable when they contain a plain imputation, not merely of some indictable offence, but one of an infamous character, or subject to an infamous or disgraceful punishment; and that an innuendo cannot alter, enlarge, or extend their natural and obvious meaning, but only explain something already sufficiently averred, or make a more explicit application of that which might otherwise be considered ambiguous to the material subject-matter properly on the record, by the way of averment or colloquium. *Gosling v. Morgan*, 32 Penn. St. 275; *Shafter v. Kinster*, 1 Binn. 537; *McClurg v. Ross*, 5 Id. 218; *Andres v. Koppenheaver*, 3 S. & R. 255.

State courts have in many instances decided that words are in themselves actionable whenever a criminal offence is charged, which, if proved, may subject the party to punishment, though not ignominious, and which brings disgrace upon the complaining party; but

¹ Probably *Kenney v. McLaughlin*, 5 Gray 3, is intended.

most courts agree that no words are actionable per se unless they impute to the party some criminal offence which may be visited by punishment either of an infamous character, or which is calculated to affect the party injuriously in his or her social standing. *Buck v. Hersey*, 31 Me. 558; *Mills v. Wimp.* 10 B. Monr. 417; *Perdue v. Burnett*, Minor, 138; *Demarest v. Haring*, 6 Cow. 76; *Townsend on Slander*, sect. 154; 1 *Wendell's Stark. on Slander*, 43; *Redway v. Gray*, 31 Vt. 297.

Formulas differing in phraseology have been prescribed by different courts; but the annotators of the American Leading Cases say that the Supreme Court of the State of New York, in the case of *Brooker v. Coffin*, appear "to have reached the true principle applicable to the subject;" and we are inclined to concur in that conclusion, it being understood that words falsely spoken of another may be actionable per se when they impute to the party a criminal offence for which the party may be indicted and punished, even though the offence is not technically denominated infamous, if the charge involves moral turpitude, and is such as will affect injuriously the social standing of the party. 1 Am. Lead Cas. (5th ed.) 98.

Comments are made in respect to verbal slander under several heads, one of which is entitled defamatory words not actionable without special damage; and the commentator¹ proceeds to remark that mere vituperation and abuse by word of mouth, however gross, is not actionable unless it is spoken of a professional man or tradesman in the conduct of his profession or business. Instances of a very striking character are given, every one of which is supported by the authority of an adjudged case. *Lumby v. Allday*, 1 *Crompt. & Jer.* 301; ²*Barnet v. Allen*, 3 H. & N. 376.

Even the judges holding the highest judicial stations in that country have felt constrained to decide, that to say of a married female that she was a liar, an infamous wretch, and that she had been all but seduced by a notorious libertine, was not actionable without averring and proving special damage. *Lynch v. Knight*, 9 H. of L. Cas. 594.

Finally, the same commentator states that words imputing to a single woman that she gets her living by imposture and prostitution, and that she is a swindler, are not actionable, even when special damage is alleged, unless *it is proved*, and the proposition is fully sustained by the cases cited in its support. *Welby v. Elston*, 8 M. G. & S. 142; *Addison on Torts* (3d ed.), 788; *Townsend on Slander*, sects. 172 and note, 516-518.

Words actionable in themselves, without proof of special damage, are next considered by the same commentator. His principal proposi-

¹ *Addison on Torts* (3d ed.) 765; (4th ed.) 954.

² *Post*, p. 447.

tion under that head is that words imputing an indictable offence are actionable per se without proof of any special damage, giving as a reason for the rule that they render the accused person liable to the pains and penalties of the criminal law. Beyond question, the authorities cited by the author support the proposition, and show that such is the rule of decision in all the courts of that country having jurisdiction in such cases. *Heming v. Power*, 10 Mees. & Wels. 570; *Alfred v. Farlow*, 8 Q. B. 854; *Edsall v. Russell*, 5 Scott, N. R. 801; *Brayne v. Cooper*, 5 Mees. & Wels. 250; *Barnet v. Allen*, 3 H. & N. 378; *Davies v. Solomon*, 41 Law Jour. Q. B. 11; *Roberts v. Roberts*, 5 B. & S. 389; *Perkins v. Scott*, 1 Hurlst. & Colt. 158.

Examined in the light of these suggestions and the authorities cited in their support, it is clear that the proposition of the plaintiff, that the words alleged are in themselves actionable, cannot be sustained.

Concede all that, and still the plaintiff suggests that she alleges in the second paragraph of her declaration that she "has been damaged and injured in her name and fame;" and she contends that that averment is sufficient, in connection with the words charged, to entitle her to recover as in an action of slander for defamatory words with averment of special damage.

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By special damage in such a case is meant pecuniary loss; but it is well settled that the term may also include the loss of substantial hospitality of friends. *Moore v. Meagher*, 1 Taunt. 42; *Williams v. Hill*, 19 Wend. 306.

Illustrative examples are given by the text-writers in great numbers, among which are loss of marriage, loss of profitable employment, or of emoluments, profits, or customers; and it was very clearly settled that a charge of incontinence against an unmarried female, *whereby she lost her marriage*, was actionable by reason of the special damage alleged and proved. *Davis v. Gardiner*, 4 Co. 16 b, pl. 11; *Reston v. Pomfreicht*, Cro. Eliz. 639.

Doubt upon that subject cannot be entertained: but the special damage must be alleged in the declaration, and proved; and it is not sufficient to allege that the plaintiff "has been damaged and injured in her name and fame," which is all that is alleged in that regard in the case before the court. *Hartley v. Herring*, 8 Term, 133; *Addison on Torts*, 805; *Hilliard on Remedies* (2d ed.), 622; *Beach v. Ranney*, 2 Hill, 309.

Tested by these considerations, it is clear that the decision of the court below, that the declaration is bad in substance, is correct.

Judgment affirmed.

LUMBY *v.* ALLDAY.

Court of Exchequer of England, Hillary Term, 1831. 1 Tyrw. 217; s. c. 1 Crompt. & J. 301.

CASE for words. The first count of the declaration stated that, before the speaking of the words, the plaintiff was, and hitherto has been, and still is, clerk to a certain incorporated company, to wit, the Birmingham and Staffordshire Gas-Light Company, and, as such clerk, had always behaved himself with great diligence, industry, and propriety, and thereby had acquired, and was acquiring, great gains and profits in his said situation as clerk to the said company; nevertheless, the defendant, well knowing the premises, but intending to bring the plaintiff into public infamy and disgrace with and among all his neighbors, and the said persons composing the said company, and to cause it to be suspected and believed by his neighbors and subjects, and the persons composing the said company, that the said plaintiff was of a bad character and unfit to hold his situation of clerk to the said company, and an improper person to be employed by the said company, and to cause him to be deprived of and lose his situation, and to vex, &c., him the said plaintiff, on, &c., at &c., in a certain discourse which the said defendant then and there had with the said plaintiff of and concerning the said plaintiff, and of and concerning the premises, in the presence and hearing of divers good and worthy subjects of this realm, then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning the premises, these false, scandalous, malicious, and defamatory words following; that is to say, "You (meaning the said plaintiff) are a fellow, a disgrace to the town, unfit to hold your (then and there meaning the said plaintiff's) situation (then and there meaning the said situation of clerk to the Birmingham and Staffordshire Gas-Light Company) for your conduct with whores; I will have you in the 'Argus;' you (then and there meaning the said plaintiff) have bought up all the copies of the 'Argus,' knowing you (then and there meaning the said plaintiff) were exposed; you may drown yourself, for you (then and there meaning the said plaintiff) are not fit to live, and a disgrace to the situation you (then and there meaning the said plaintiff) hold" (then and there meaning the said situation of clerk to the Birmingham and Staffordshire Gas-Light Company).

The above words were stated with some variations in several other counts. Plea, general issue. At the trial before Alexander, C. B., at the Warwick Summer Assizes, in 1830, it appeared that the plaintiff had for three years acted as clerk to the Birmingham and Staffordshire Gas-Light Company, at a salary of £250 per annum. The most

defamatory of the words laid in the first count were proved. The "Argus" was proved to be a publication appearing at Birmingham monthly. No proof was given of any written appointment of the plaintiff as clerk. The Chief Baron directed the jury that if in their opinion the words used would probably tend to injure the plaintiff in his office of clerk he was entitled to a verdict. The jury found a general verdict for the plaintiff. Damages, 40s.

BAYLEY, B. This case came before the court on a rule nisi to enter a nonsuit, the ground of which was, that the words proved on the trial were not actionable. Two points were discussed upon this rule: one, whether the words were actionable or not; and the other, whether this was properly a ground of nonsuit.

The declaration stated that the plaintiff was clerk to an incorporated company, called the Birmingham and Staffordshire Gas-Light Company, and had behaved himself as such clerk with great propriety, and thereby acquired, and was daily acquiring, great gains; but that the defendant, to cause it to be believed that he was unfit to hold his situation, and an improper person to be employed by the company, and to cause him to be deprived of his situation, spoke the words in the first count [which the learned judge here read].

The objection to maintaining an action on these words is, that it is only on the ground of the plaintiff's being clerk to the company that they can be actionable; that it is not alleged that they are spoken of him in reference to his character or conduct as clerk; that they do not from their tenor import that they were spoken with any such reference; and that they do not impute to him the want of any qualification which a clerk ought to have, or any misconduct which would make him unfit to discharge faithfully and correctly all the duties of such a clerk.

The plaintiff relied on the rule laid down by De Grey, C. J., in *Onslow v. Horne*, 3 Wils. 186, that words are actionable when spoken of one in an office of profit which may probably occasion the loss of his office, or when spoken of persons touching their respective professions, trades, and businesses, and do or may probably tend to their damage. The same case occurs in Sir William Blackstone's Reports, 753, where the rule is expressed to be, "if words may be of probable ill consequence to a person in a trade, or profession, or office."

The objection to the rule as expressed in both reports appears to me to be, that the word "probably" or "probable" is too indefinite and loose, and that unless it is considered as equivalent with "having a natural tendency to," and is confined within the limits I have expressed in stating the defendant's objection, viz., that of showing the want of some necessary qualification, or some misconduct in the office, it goes beyond what the authorities warrant. Every authority I have been able to meet with either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the

plaintiff's office, trade, or business. Immorality only, however gross, is all which is imputed, as here charged. As at present advised, therefore, we are of opinion that the charge proved in this case is not actionable, because the imputation it contains does not imply a want of any of those qualifications which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk.¹

THORLEY v. KERRY.

Exchequer Chamber of England, Easter Term, 1812. 4 Taunt. 355.

THIS was a writ of error brought to reverse a judgment of the Court of King's Bench. The plaintiff below declared that he was a good, true, honest, just, and faithful subject of the realm, and, as such, had always behaved, and considered himself, and, until the committing of the several grievances by the defendant thereafter mentioned, was always reputed, esteemed, and accepted, by and amongst all his neighbors, and other good and worthy subjects of this realm, to whom he was in anywise known, to be a person of good name, fame, and credit, to wit, in the parish of Petersham, in the county of Surrey, and also that he had not ever been guilty, or, until the time, &c., been suspected, of the offences and misconduct thereafter mentioned to have been charged upon and imputed to him; or of any such offences or misconduct, by means of which premises he had before the committing of the several grievances deservedly obtained the good opinion and credit of all his neighbors, and other good and worthy subjects of this realm, to whom he was known, to wit, at Petersham; and also that, before and at the time of the committing of the grievances by the defendant below, as hereinafter mentioned, the plaintiff below was tenant to the Right Hon. Archibald Lord Douglas, of a messuage and premises, with the appurtenances, situate in the parish of Petersham, and he being desirous and intending to become a parishioner of the same parish, and to qualify himself to attend the vestry of and for such parish, as such parishioner, agreed with Lord Douglas to pay the taxes of and for the said house, which he so inhabited as tenant to Lord Douglas; and also that, before and at the time of the committing of the grievances by the defendant below in the first count mentioned, the defendant below was the church-warden of and for the parish of Petersham, and the plaintiff below, so being desirous and intending to attend such vestry of such parish as such parishioner, had thereupon, by his certain note in writing, given notice to the defendant below

¹As to the other point in the case, it was held that, as the speaking of the words alleged was proved, there was no ground for a nonsuit; but liberty was given to move in arrest of judgment.

of his agreement with Lord Douglas; yet the defendant below, well knowing the premises, and greatly envying the happy state and condition of the plaintiff below, and contriving, and wickedly and maliciously intending, to injure him in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbors, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbors and subjects, that he has been and was guilty of the offences and misconduct hereinafter mentioned to have been charged upon and imputed to him, and to vex, harass, and oppress him, at Petersham aforesaid, falsely, wickedly, and maliciously did compose and publish, and cause and procure to be published of and concerning him, and concerning such agreement with Lord Douglas, and concerning the said note in writing, a certain false, scandalous, malicious, and defamatory libel in the form of a letter to the plaintiff below, containing, amongst other things, the false, scandalous, malicious, and defamatory and libellous matter following (accompanied with the following amongst other innuendoes), that is to say, "My lord, I conceive, as church-warden (meaning as church-warden of the parish of Petersham), I have nothing to say to any private agreement with Lord Douglas and yourself; your note (meaning the note sent to the defendant below by the plaintiff below), and the manner it was conveyed to me, shows your lordship still possesses that perturbed spirit which I had hoped, for your own sake, after the composition and publishing of the scurrilous address of the 26th August, would have been at rest. I had before read the virulent, disrespectful, and ungentlemanlike letters to the Rev. Mr. Marsham; I sincerely pity the man (meaning the plaintiff below) that can so far forget what is due, not only to himself, but to others, who, under the cloak of religious and spiritual reform, hypocritically, and with the grossest impurity, deals out his malice, uncharitableness, and falsehoods. N. B. It was my intention never to have held or had communication with a writer of anonymous letters (meaning that the plaintiff below was a writer of anonymous letters), but it appears I cannot now avoid it" (thereby meaning that the plaintiff below had been and was guilty of hypocrisy and dishonorable conduct). There were other counts setting out parts only of the same letter; and the plaintiff below concluded by averring that by means of the committing of the grievances by the defendant below, the plaintiff below had been and was greatly injured in his good name, fame, and credit, and brought into public scandal, infamy, and disgrace with and amongst all his neighbors and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects to whom the innocence, candor, truth, integrity, reverence, and respect of the religion of the plaintiff below was unknown, had, on occasion of the committing of the said several grievances by the defendant below, from thence hitherto suspected and believed, and still did suspect and

believe, the plaintiff below to have been guilty of the offences and improper conduct imputed to him as aforesaid, and to have been and still to be guilty of hypocrisy, malice, uncharitableness, and falsehood; and had, by reason of the committing of the several grievances by the defendant below, from thence hitherto, and still did refuse to have any acquaintance, intercourse, or discourse with the plaintiff below, as they were before used and accustomed to have, and otherwise would have had. And the plaintiff below had been and was by means of the premises otherwise greatly injured, to wit, in the parish of Petersham, to his damage of £2,000. Upon not guilty pleaded, the cause was tried at the Surrey Spring Assizes, 1809, when the writing of the letter by the defendant was proved, and that he delivered it unsealed to a servant to carry, who opened and read it. A verdict was found for the plaintiff with £20 damages, and judgment passed for the plaintiff without argument in the court below. The plaintiff in error assigned the general errors.

MANSFIELD, C. J. This is a writ of error, brought to reverse a judgment of the Court of King's Bench, in which there was no argument. It was an action on a libel published in a letter, which the bearer of the letter happened to open. The declaration has certainly some very curious recitals. It recites that the plaintiff was tenant to Archibald Lord Douglas of a messuage in Petersham, that being desirous to become a parishioner and to attend the vestry, he agreed to pay the taxes of the said house; that the plaintiff in error was churchwarden, and that the defendant in error gave him notice of his agreement with Lord Douglas, and that the plaintiff in error intending to have it believed that the said earl was guilty of the offences and misconducts thereafter mentioned (offences there are none, misconduct there may be), wrote the letter to the said earl which is set forth in the pleadings. There is no doubt that this was a libel, for which the plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule. For all words of that description an indictment lies; and I should have thought that the peace and good name of individuals were sufficiently guarded by the terror of this criminal proceeding in such cases. The words, if merely spoken, would not be of themselves sufficient to support an action. But the question now is, whether an action will lie for these words so written, notwithstanding such an action would not lie for them if spoken; and I am very sorry it was not discussed in the Court of King's Bench, that we might have had the opinion of all the twelve judges on the point, whether there be any distinction as to the right of action between written and parol scandal; for myself, after having heard it extremely well argued, and especially in this case, by Mr. Barnewall, I cannot, upon principle, make any difference between

words written and words spoken, as to the right which arises on them of bringing an action. For the plaintiff in error it has been truly urged that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second's time, and the difference has been recognized by the courts for at least a century back. It does not appear to me that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives; and the law gives a very ample field for retribution by action for words spoken in the cases of special damage, of words spoken of a man in his trade or profession, of a man in office, of a magistrate or officer: for all these an action lies. But for mere general abuse spoken, no action lies. In the arguments both of the judges and counsel, in almost all the cases in which the question has been, whether what is contained in a writing is the subject of an action or not, it has been considered whether the words if spoken would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace; but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shows more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damage sustained. So it is argued that written scandal is more generally diffused than words spoken, and is therefore actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter; it is true that a newspaper may be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names known to the law, — Lord Hardwicke, Hale, I believe, Holt, C. J., and others. Lord Hardwicke, C. J., especially has laid it down that an action for a libel may be brought on words written, when the words if spoken would not sustain it. Com. Dig. tit. Libel, referring to the case in Fitzg. 122. 253, says, there is a distinction between written and spoken scandal. By his putting it down there, as he does, as being the law, without making any query or doubt upon it, we are led to suppose that he was of the same opinion. I do not now recapitulate the cases; but we cannot, in opposition to them, venture to lay down at this day that no action can be maintained for any words written, for which an action could not be maintained if they were spoken. Upon these grounds we think the judgment of the Court of King's Bench must be affirmed. The purpose of this action is to recover a compensation for some damage supposed to be sustained by the plaintiff by reason of the libel. The tendency of the libel to provoke a breach of the peace, or the degree

of malignity which actuates the writer, has nothing to do with the question. If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken.

Judgment affirmed.

PERRY *v.* PORTER.

Supreme Court of Massachusetts, April, 1878. 124 Mass. 338.

THE case is stated in the opinion.

MORTON, J. The plaintiff's declaration contains thirteen counts for slander and a count for libel. Of the counts for slander he has furnished us with copies of the fifth, seventh and tenth only, and we assume that he now relies only upon these three counts.

At the close of the trial, the court ruled that there was no evidence to support the counts for slander. The correctness of this ruling presents the first question in the case.

The fifth count alleges that the defendant accused the plaintiff of the crime of larceny by words spoken of and concerning the plaintiff, substantially as follows: "He (meaning the plaintiff) is a rascal, a villain and a thief." To sustain this count, the plaintiff must prove that the defendant accused him of the crime of larceny by words substantially like those alleged. *Payson v. Macomber*, 3 Allen, 69. There was no evidence in the case that the defendant used the words charged, or any similar words. The words used by the defendant, as testified to by the witness, accuse the plaintiff of deception and fraud towards Mrs. Atkins, but they do not impute, and could not have been understood as charging, the crime of larceny.

The seventh count alleges that the defendant accused the plaintiff of the crime of larceny, or some other criminal offence, by words spoken of and concerning the plaintiff substantially as follows: "He (meaning the plaintiff) has done that which was in fact no better than stealing," meaning thereby that the plaintiff had committed the crime of larceny or some other criminal offence. "That said false and malicious accusations were made to the trustees of Boston University and members of Boston Wesleyan Association (of each of which corporations the plaintiff was a member, and secretary of said trustees) and to others, and made to said trustees for the purpose of causing the plaintiff's removal and to prevent his reelection as secretary of said trustees." The count then proceeds to allege as special damage the loss of the plaintiff's reelection as secretary of the trustees of Boston University.

The tenth count alleges that the defendant accused the plaintiff of the crime of gross fraud, by saying of him, "He has committed gross fraud," and in all other respects is like the seventh count.

The allegation in these counts, that the said false and malicious accusations were made to the trustees of Boston University and members of Boston Wesleyan Association and others, is material. The fact of the publication of the slander must be proved as alleged. If the plaintiff alleges a publication generally, the fact may be proved by any person who heard the words. But if he adds any allegation which narrows and limits that which is essential, it becomes descriptive and must be proved as laid. *Chapin v. White*, 102 Mass. 139. *Downs v. Hawley*, 112 Mass. 237.

The allegation we are considering limits and narrows the general allegation of publication. It identifies the slander upon which the plaintiff relies, and must be proved as laid. There was no evidence that the publication by the defendant of the alleged slanderous words was made to the trustees of Boston University as a body, or to any of the members or trustees, or to members of the Boston Wesleyan Association, or for the purpose of preventing the plaintiff's reelection as secretary.

The plaintiff proved three publications, two by the witness Clark, the other by the witnesses Sleeper and Benyon, upon either of which he might elect to rely. But the proof as to neither of them corresponds with the allegation that it was made to the persons described, for the purpose alleged. The fact that the person to whom the accusation is made happens to be one of the trustees is not sufficient to satisfy the allegation that it was made to the trustees of the Boston University.

We are therefore of opinion that the court correctly ruled that the counts for slander could not be maintained upon the evidence.

In regard to the count for libel, the vital question is as to the correctness of the ruling of the court, that, if the jury found the matter contained in the publication charged as libellous to be true, this was a complete defence to the action.

The plaintiff relied upon the Gen. Sts. c. 129, § 77,¹ and contended that the truth was not a justification and defence, if it was proved that the article was published with express malice. But the court ruled that the exception in the statute was not applicable to a civil action, and that proof of the truth was of itself a defence.

At common law, in private actions for libel or slander, proof of the truth is a justification.² But in public prosecutions the rule was otherwise, and it was accordingly held in *Commonwealth v. Blanding*, 3 Pick. 304, that on an indictment for libel the truth of the matter published was not admissible in evidence. Probably in consequence

¹ Rev. Laws, ch. 173, § 91.

² *Bigelow on Torts*, 8th ed., p. 300.

of this decision, the Legislature enacted in 1827 that in every prosecution for a libel the defendant might give in evidence in his defence the truth of the matter charged to be libellous, but that such evidence should not be a justification unless it was made to appear that such matter was published with good motives and for justifiable ends. St. 1826, c. 107, § 1.¹

This was reënacted in the Rev. Sts. c. 133, § 6, and remained the law until 1855, when it was provided that "in every prosecution, and in every civil action for writing or for publishing a libel, the defendant may give in evidence, in his defence upon the trial, the truth of the matter contained in the publication charged as libellous; and such evidence shall be deemed a sufficient justification, unless malicious intention shall be proved." St. 1855, c. 396, § 1.

This provision was without change incorporated into the Gen. Sts. c. 129, § 77. It is true that all the prior legislation had been, not in the direction of limiting the effect of proof of the truth in civil actions, but in the direction of enlarging its effect in favor of the defendant in a criminal prosecution. The St. of 1826 for the first time permitted the truth to be given in evidence as a justification in criminal prosecutions. Under its provisions, the burden of proof was upon the defendant to show not only the truth of the matter charged to be libellous, but also that it was published with good motives and for justifiable ends. *Commonwealth v. Bonner*, 9 Met. 410.

The St. of 1855 goes further in favor of defendants in criminal prosecutions and throws the burden on the government, if the defendant establishes the truth, of proving that the publication was made with malicious intention. In this respect, it accords with the general tendency of modern legislation to make the proof of the truth more effective in the defence of a prosecution for libel.

These considerations, and the further argument that, if the Legislature had intended to make so important a change in the law of libel in civil suits, it would have done so in direct affirmative language, afford some ground for the inference that it was not intended that the exception in the concluding words of St. of 1855 should apply to civil actions.

But, on the other hand, we must construe the words of the statute "according to the common and approved usage of the language" unless such construction would be inconsistent with the manifest intent of the Legislature. Gen. Sts. c. 3, § 7, cl. 1.

The statute in its terms is made applicable "in every prosecution and in every civil action for writing or for publishing a libel." The provisions that the truth may be given in evidence, and if proved shall be a sufficient justification, undoubtedly were intended to apply to civil and criminal proceedings. According to the common and approved usage of the language, the exception or qualification contained

¹ Rev. Laws, ch. 219, § 8.

in the words, "unless malicious intention shall be proved," also applies to civil actions as well as to criminal prosecutions; and we are not able to see either in the context or in the history of previous legislation upon the subject, sufficient evidence of a manifest intent of the Legislature that it should be limited to criminal prosecutions.

We are of opinion, therefore, that the court erroneously ruled at the trial that the exception in the statute did not apply to a civil action, and that the proof of the truth was of itself a defence. But, as this error affected only the count for libel, and as the plaintiff has fully tried his counts for slander, we are of opinion that a new trial should be granted only upon the count for libel.

Exceptions sustained.

BACON v. MICHIGAN CENTRAL RAILROAD COMPANY.

Supreme Court of Michigan, June, 1887. 66 Mich. 166.

THE case is stated in the opinion.

CHAMPLIN, J. The Michigan Central Railroad Company is, and for a long time has been, engaged in operating a railroad extending from Detroit to Chicago. It employs agents at different points on its line, who have the care of divisions of its road, and who are authorized to hire men to work for defendant. It has adopted and carried into effect a plan by which every employee who is discharged from its service is reported to every agent authorized to employ men upon the line of its road regularly once a month. A list is made out by the assistant superintendent in charge of a division, in which is entered the names of the persons discharged the previous month, their occupation and cause; and this list is sent to each of the agents of the company authorized to employ men, and by them these lists are kept on file for their future reference and guidance in employing men. If a person who has been discharged from the service of the company applies for employment, the agent examines the list; and, if it there appears that he was discharged for some offence, he refuses to employ him. The railroad company claims that the plan adopted is essential to the efficiency of the force employed by it, and to the protection of the company and the public against engaging in its service incompetent or dishonest servants.

The plaintiff is a carpenter, and had been employed by the defendant for three or four years in the bridge department. He resided at Niles, a station on the line of defendant's road. He had been at work at Michigan City under a foreman by the name of Palmer, and about the fourteenth of March, 1882, and on the evening of that day, he entered the fast train of defendant to ride to Niles. He sat in the smoking car, which was poorly lighted, and he threw his over-

coat in a seat near by. When he reached Niles, on leaving the train in a hurry, by mistake he picked up a coat which was not his, and left his own, and carried it, with his tools, to the company's shop, and threw it across a bench. The owner of the coat, who was at the time in the dining car, on returning, discovered his loss, and reported it to the conductor. The coat which belonged to the plaintiff was found where plaintiff and other employees had been sitting. It was an old coat, much worn, and had on it a leather button, attached to a string. The conductor telegraphed the chief train dispatcher at Jackson that there had been a coat taken on his train at Niles by one of Mr. Palmer's men, and another left in its place. The matter was placed in the hands of a special agent, or detective of the company, who sent word to Mr. Humphrey, another employee of the company, at Niles. The next morning after he received word from the special agent, he went into the yard where Mr. Bacon was at work, and asked him if his coat had a leather button on it, and he said it had. He then told him he had such a coat in the baggage room, and that he (Bacon) had made a mistake, and got another coat. Bacon then went over to the bench where he had left the coat he had taken from the car, and handed it to Humphrey, saying that it was not his, and advised Humphrey to send it back. The coats were quite dissimilar; the plaintiff's being a much worn chinchilla, and the other a beaver cloth coat, some worn, but in good condition. The special agent made his report to the assistant superintendent, stating that the coat had been taken from the train, and that there was a big mistake, — after seeing both coats. — so much so that he could not believe the man honest who had taken it, and told him "that we had enough to do to watch professional thieves without watching our own men." He both wrote and had a personal interview with the assistant superintendent. He did not, before he made the report, go to Niles to make examination in reference to the case. His report was based upon the inspection of the two coats, and what he had learned from Mr. Humphrey and the conductor. He testified that he believed what he stated in his report to Mr. Brown, the assistant superintendent. A day or two later, plaintiff was discharged, for which no cause was assigned at the time. Mr. George Dollivar was the defendant's agent at Niles as division roadmaster, and whose duty it was to employ men. He received one of these discharged lists in April, 1882, for the month of March. Plaintiff came to him, and requested to see the list. He showed it to him. It contained, among other names, the following:

March			1882.		
Name		Occupation		Why Discharged	
Bacon, John.		Carpenter.		Stealing.	

Thereupon the plaintiff brought this action of libel against defendant.

The court charged the jury that the communication was privileged, and the plaintiff could not recover without proving affirmatively not only the falsehood of its contents, but also that it was published with express malice; and upon the latter point he instructed the jury that there was no evidence to go to them, and he directed a verdict for the defendant. This charge of the court raises the only questions for our consideration, which are, first, was the communication privileged; and, second, did the court err in taking the case from the jury on the ground of an entire want of evidence of express malice.

It is not claimed that the communication belongs to that class which are absolutely privileged, but counsel for defendant contend that it was a publication which related to a matter in which the defendant was interested, and concerning which the corporation and its officers to whom it was sent must needs be advised in order to prosecute defendant's business successfully, and therefore it was *prima facie* privileged; and, to entitle plaintiff to recover, he must show that the publication was both false and malicious.

The great underlying principle upon which the doctrine of privileged communications stands, is public policy. This is more especially the case with absolute privilege, where the interests and necessities of society require that the time and occasion of the publication or utterance, even though it be both false and malicious, shall protect the defamer from all liability to prosecution for the sake of the public good. It rests upon the same necessity that requires the individual to surrender his personal rights and to suffer loss for the benefit of the common welfare. Happily for the citizen, this class of privilege is restricted to narrow and well-defined limits. Qualified privilege exists in a much larger number of cases. It extends to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty. And the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation. *Thompson v. Dashwood*, 11 Q. B. Div. 45; *Davies v. Snead*, L. R. 5 Q. B. 611; *Waller v. Lock*, 45 Law T. (N. S.) 243; *Somerville v. Hawkins*, 10 C. B. 583, 20 Law J. C. P. 131; *Toogood v. Spyring*, 1 Crompt., M. & R. 181; *Capital and Counties Bank v. Henty*, 7 App. Cas. 741; *Delancy v. Jones*, 4 Esp. 193; *Laughton v. Bishop, etc.*, L. R. 4 C. P. 495, 504; *Harrison v. Bush*, 5 El. & Bl. 344, 25 Law J. Q. B. 25; *Whiteley v. Adams*, 15 C. B. (N. S.) 392, 33 Law J. C. P. 89; *Shipley v. Todhunter*, per Tindal, C. J., 7 Car. & P. 680; *Harris v. Thompson*, 13 C. B. 333; *Wilson v. Robinson*, 7 Q. B. 68, 14 Law J. Q. B. 196; *Taylor v. Hawkins*, 16 Q. B. 308, 20 Law J. Q. B. 313; *Manby v. Witt*, 18 C. B. 544, 25 Law J. C. P. 294; *Lewis*

v. Chapman, 16 N. Y. 372; *Henwood v. Harrison*, 41 Law J. C. P. 206; *Edwards v. Chandler*, 14 Mich. 471; *Washburn v. Cooke*, 3 Denio, 110; *Knowles v. Peek*, 42 Conn. 386; *Easley v. Moss*, 9 Ala. 266; *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Cockayne v. Hodgkisson*, 5 Car. & P. 543; *MDougall v. Clridge*, 1 Camp. 267; *Weatherston v. Hawkins*, 1 Term R. 110.

The communication in question here is clearly within the principle of the cases above cited. It was made by a person interested in behalf of defendant company, and having in charge its affairs to a certain extent, to another person alike interested in behalf of the company regarding matters pertaining to his duties as an agent of the company authorized to employ men. Care was taken to restrict the communication to the proper persons, and also to prevent undue publicity. It is not only proper, but it is of the utmost importance to the company, and to the public having business transactions with it, that the servants employed by it shall be men of good character, temperate, and efficient. Corporations may be liable for the negligence of their employees; not only so, but they may be held responsible for not engaging suitable servants, as well as for continuing in their employment unsuitable servants whereby third persons suffer loss or injury through the want of care, skill, temperate habits, or honesty of such servants. The plan adopted and pursued by the defendant was intended to protect the company against employment of persons whom it had found to be unworthy or inefficient, and is as fully privileged as a communication from one stockholder to another respecting the employment of a superintendent, or from one partner to another respecting the employment of a book-keeper, or from a person interested in a lawsuit to another interested respecting the solicitor employed. But it is said that it was not necessary to state the cause of the discharge; that the communication was from a superior to a subordinate, and would have been sufficient to state the fact of the discharge, without stigmatizing the plaintiff as a thief. This objection goes only to the character of the language used, and not to the occasion. The occasion determines the question of privilege. The language is only proper to be considered in connection with the question of malice. In the discharge list put in evidence there appear the names of 30 persons who were discharged in March, 1882. Of these six were discharged for drunkenness and intemperance, who had been employed as clerks, brakemen, switchmen, and laborers; others for incompetency and carelessness. It is in proof that defendant had about 5,000 men in its service, and any one can see that some system is necessary to prevent being imposed upon by persons unfit to be engaged in such important business as operating a railroad, where lives and property depend upon the trustworthiness of those filling every grade of employment down to and including the common laborer. The ruling of the court as to the privileged character of the communication was correct.

The meaning in law of a privileged communication is that it is made on such an occasion as rebuts the prima facie inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the onus of proving malice in fact; but not of proving it by extrinsic evidence only: he has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is any evidence of malice on the face of it. *Wright v. Woodgate*, 2 Crompton, M. & R. 573, 1 Gale, 329. It was held in *Somerville v. Hawkins*, supra, that, a communication being shown to be privileged, it lies upon the plaintiff to prove malice in fact; that, in order to entitle him to have the question of malice left to the jury, he need not show circumstances necessarily leading to the conclusion that malice existed, or such as are inconsistent with its non-existence, but they must be such as raise a probability of malice, and be more consistent with its existence than its non-existence; and in *Cooke v. Wildes*, 5 El. & Bl. 329, it was held that if the occasion creates such privilege, but there is evidence of express malice, either from extrinsic circumstances or from the language of the libel itself, the question of express malice should be left to the jury. In actions for defamation, malice is an essential element in the plaintiff's case. But in these cases the word "malice" is understood as having two significations; one, its ordinary meaning of ill will against a person, and the other its legal signification, which is a wrongful act done intentionally, without just cause or excuse. These distinctions have been denominated *malice in fact* and *malice in law*. The first implies a desire and an intention to injure; the latter is not necessarily inconsistent with an honest purpose, but, if false and defamatory statements are made concerning another without sufficient cause or excuse, they are legally malicious, and in all ordinary cases malice is implied from the defamatory nature of the statements and their falsity. The effect, therefore, of showing that the communication was made upon privileged occasion is prima facie to rebut the quality or element of malice, and casts upon the plaintiff the necessity of showing malice in fact, — that is, that the defendant was actuated by ill will in what he did and said, with a design to causelessly or wantonly injure the plaintiff, — and this malice in fact, resting as it must, upon the libellous matter itself and the surrounding circumstances tending to prove fact and motive, is a question to be determined by the jury. The question whether the occasion is such as to rebut the inference of malice if the communication be bona fide is one of law for the court; but whether bona fides exists is one of fact for the jury. 1 Amer. Lead. Cas. (5th ed.), 193; *Smith v. Youmans*, 3 Hill (S. C.), 85; *Hart v. Reed*, 1 B. Mon. 166, 169; *Gray v. Pentland*, 4 Serg. & R. 420, 423; *Flitercraft v. Jenks*, 3 Whart. 158. The jury may find the existence of actual malice from the language of the communication itself, as well as from extrinsic evidence.

Hastings *v.* Lusk, 22 Wend. 410, 421; ¹ Coward *v.* Wellington, 7 Car. & P. 531, 536; Wright *v.* Woodgate, per Parke, B., 2 Crompt., M. & R. 573, 578; Jackson *v.* Hopperton, 16 C. B. (N. S.), 111 E. C. L. 829.

I agree with Erle, C. J., in the case last cited, that —

“A plaintiff does not sustain the burden of proof which is cast upon him by merely giving evidence which is equally consistent with either view of the matter in issue. When the presumption of malice is neutralized by the circumstances attending the utterance of the slander or the publication of the libel, the plaintiff must give further evidence of actual or express malice in order to maintain his action.”

Was there evidence here which would warrant the jury in inferring that defendant acted from malicious motives when charging that plaintiff was discharged from its employment for “stealing?” The case is obscured somewhat from the fact that the defendant is a corporation, and its motives must be sought for in the acts and utterances of its agents, authorized or ratified by the corporation. The communication itself charges a crime. If made wantonly; if made without any reasonable evidence of its truth, or such evidence or circumstances as would lead an ordinarily prudent person to believe its truth; if the means of investigation were at hand, and none were made; or, if investigation was made, the extent of the investigation, and what transpired, — in short, all the facts and circumstances which preceded and led up to the charge of stealing, — were proper, together with the charge itself, to be submitted to the jury; and from the whole evidence it was their province to determine whether the charge was made through personal ill will or a wanton disregard of the character and rights of plaintiff. To my mind, there was evidence, intrinsic and extrinsic, from which the jury would have been justified in finding that the defendant was actuated by malice in fact, or express malice. The intrinsic evidence is found in the charge itself, taking for granted what was proved, that the exchange of coats was a mistake, caused by carelessness or negligence, without any criminal intent. It was for the jury to say that the circumstances were such under which the coat was taken, the information received by the special agent, the report made to the assistant superintendent, as to repel and rebut the bona fides of the defendant’s agents in stating that plaintiff was discharged for stealing. And, while I think there was evidence tending to show that the agents of the defendant were acting through spite or resentment towards the plaintiff because he had not exercised greater care when taking the wrong coat when leaving the car, yet I fully agree in the remarks of Baron Parke in *Toogood v. Spyring*, 1 Crompt., M. & R. 193, that if such communications are fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience

¹ Post, p. 464.

and welfare of society, and the law has not restricted the right to make them within any narrow limits. If the agents of the defendant honestly believed that the plaintiff took the coat in question under the circumstances detailed to them, with the intention of appropriating it to his own use, the defendant is protected in having listed plaintiff as having been discharged for stealing. I think the evidence in the case should have been submitted to the jury to determine whether defendant, through its agents, acted in good faith, under all the circumstances of the case. *Klinck v. Colby*, 46 N. Y. 427; *Brow v. Hathaway*, 13 Allen, 239; *Gassett v. Gilbert*, 6 Gray, 94; *Fowles v. Bowen*, 30 N. Y. 25; *Kelly v. Partington*, 4 Barn. & Adol. 700, 24 E. C. L. 307.

SHERWOOD, J., concurred with CHAMPLIN, J.

CAMPBELL, C. J. I am not satisfied the libel was privileged, and therefore concur in reversal.

MORSE, J. I concur in the reversal.

The judgment must be reversed, and a new trial granted.

SHECKELL v. JACKSON.

Supreme Court of Massachusetts, September, 1852. 10 Cush. 25.

THE case is stated in the opinion of the court.

SHAW, C. J. This is an action on the case for a libel published of the plaintiff, an inhabitant of the District of Columbia, charging him with treachery and bad faith, in regard to money received by the plaintiff, to obtain the manumission of a fugitive slave, and then inviting the slave to go into a slave district, for the purpose of again placing him in a state of slavery. The case was original in this court; was tried before Mr. Justice Fletcher, and the only question before us arises on his report.

A witness, described as a news-collector, having testified that he wrote a part of the article complained of, and the part tending perhaps most to slander the plaintiff, it was on the part of the defendants proposed to ask him "what inquiries and examinations he made, and what sources of information he applied to, before making the communications" tending to charge the plaintiff with dishonesty and bad faith. This was objected to and rejected. This we think was correct. The answers could have no tendency to prove the truth of the facts charged; and for the purpose of proving reports and rumors, from whatever source derived, we think they were immaterial and inadmissible.

The same objection we think lies, with increased strength against the offer by the defendants to prove that there was a general anxiety

in the community lest Ringgold, the colored man in question, had been deceived in the transactions with the plaintiff referred to, and thus reduced to slavery. Without any attempt or offer to prove the fact that the plaintiff had been guilty of the deception imputed to him, the general anxiety, if it existed, afforded no justification or excuse for charging such misconduct upon the plaintiff, in a newspaper intended for general circulation in the community.

The other exception related to the directions given by the judge to the jury in matter of law, which were as follows:

"On the part of the defendants, it is maintained, that when a party has a duty to perform, and in the performance of that duty states honestly what he believes to be true, the occasion furnishes a justification for the statement, though he may be mistaken; and that the case of the defendants comes within the principle. It is true there is such a class of cases. When a party has a duty to perform, and states honestly what he believes to be true, though mistaken, the occasion furnishes a justification, unless the plaintiff can show express malice. The occasion in such a case prevents the implication of malice. This principle is stated in the case of *Bradley v. Heath*, 12 Pick. 163."

"So in this case, if the occasion were such an one as comes within this principle, then it would prevent the implication of malice, for publishing what was not true, and the plaintiff would not recover without showing express malice."

"But in point of law, the occasion of this publication was not such an one as affords a justification to the defendants for publishing what was not true. The defendants' case does not come within the privileged or excepted cases from the general rule. But if the publication is libellous upon the plaintiff, upon the definition of libel as before given to you, then the defendants are by law responsible to the plaintiff in damages for the injury they have done him."

"Then it has been urged upon you that conductors of the public press are entitled to peculiar indulgence, and have especial rights and privileges. The law recognizes no such peculiar rights, privileges, or claims to indulgence. They have no rights but such as are common to all. They have just the same rights that the rest of the community have, and no more. They have the right to publish the truth, but no right to publish falsehoods to the injury of others with impunity."

These instructions, in the opinion of the court, are correct in point of law, carefully illustrated and qualified, and were well adapted and applied to the circumstances of the case.

Judgment on the verdict for the plaintiff.

HASTINGS v. LUSK.

Court of Errors of New York, December, 1839. 22 Wend. 410.

ACTION for slander, charging the plaintiff Lusk with perjury in an examination before a magistrate, where the defendant Hastings had been charged with threatening to shoot Lusk. Plea of the general issue. The defence, inter alia, was that the words were spoken by the defendant while conducting his own defence in said case, and that they were *relevant and pertinent* to the examination. There was also a plea of no malice. Replication traversing the pleas; issues thereon; and verdict for the plaintiff, with nominal damages. The jury found specially that the words were spoken falsely and maliciously, and that they were not relevant, and were not uttered in the course of his defence before the magistrate, but elsewhere.

Motion in arrest of judgment overruled; whereupon defendant sued out a writ of error.

THE CHANCELLOR. The principle involved in this case is of great importance to the community, inasmuch as it involves the rights and privileges of counsel and of parties in the investigation of suits and other proceedings before our judicial tribunals; and as I believe it is the first cause of the kind which has been brought before this court of dernier ressort, and has been very fully and most ably argued here by the counsel upon both sides, I have considered it my duty to examine the law on the subject more fully than would be necessary or proper in an ordinary case of mere verbal slander; for it is not only right and proper that parties and their counsel should know what their privileges are, but also that the law should be deliberately and correctly settled. In applying the principles of law to the case under consideration, we must, therefore, be careful on the one hand that we do not restrict counsel within such narrow limits that they will not dare to openly and fearlessly discharge their whole duty to their clients, or to themselves when they manage their own cases; and, on the other hand, we must not furnish them with the shield of Zeus, and thereby enable them with impunity to destroy the characters of whomsoever they please.

There are two classes of *privileged communications* recognized in the law in reference to actions of slander, and the privileges of counsel may sometimes fall within the one class and sometimes within the other. In one class of cases the law protects the defendant so far as not to impute malice to him from the mere fact of his having spoken words of the plaintiff which are in themselves actionable, though he may not be able to prove the truth of his allegations. But the plaintiff will be able to sustain his action for slander, if he can satisfy the jury, by other proof, that there was *actual malice* on

the part of the defendant, and that he uttered the words for the mere purpose of defaming the plaintiff. In the other class of cases the privilege is an effectual shield to the defendant; so that no action of slander can be sustained against him, whatever his motive may have been in using slanderous words.

One of the earliest cases of the first class is Parson Prit's Case, reported by Rolle. 1 Roll. Abr. 87, pl. 5. Although the report of this case is very short, it will be perfectly understood by a reference to Fox's "Martyrology," where the author, in giving an account of the severe punishments inflicted by the vengeance of Heaven upon some of the persecutors of the Protestants during the reign of the Bloody Mary, states that Grimwood or Greenwood, as he is called by Rolle, one of the perjured witnesses who was hired to swear away the life of John Cooper, an innocent person, who was convicted and hanged, was soon after destroyed by the terrible judgment of God, being suddenly seized while in perfect health, so violently that his bowel gushed out. From the report it appears that the defendant, Parson Prit, having been recently settled in the parish, and not knowing all his parishioners, in preaching against the heinous sin of perjury cited this case from the "Book of Martyrs;" and no doubt commented severely upon Greenwood, and upon White, his forsworn companion, who by their perjury had caused an innocent man to be drawn in quarters and his wife and children to be left desolate. It turned out, however, that Greenwood was not dead, and that, being a resident of that parish, he was present in the church and heard the sermon, and afterwards brought a suit against the parson for charging him with perjury. But the court held that it was a *privileged communication*, and the circumstances under which the words were spoken showed there was no actual malice towards the plaintiff. See also Cro. Jac. 91. This case has been followed by a numerous class depending upon the same principle, in which the speaking of the words is held to be a privileged communication, the occasion of the speaking being such, that *prima facie* there could have been no malicious intent to defame the person of whom they were spoken, and the interests of society requiring that the defendant should be permitted to speak freely in the situation in which he is placed, provided he confine himself within the bounds of what he believes to be the truth. . . . [A question of pleading discussed.] The presumption in these cases, that there was no malice, is not rebutted by the plaintiff's merely showing that the charge against him was untrue in point of fact; it must be further shown that the defendant either knew or had reason to believe it was untrue at the time of the speaking of the words complained of. *Kine v. Sewell*, 1 Horn & Hurl. 83; 3 Mees. & Wels. 297. s. c. Proving that the defendant knew the charge to be false would unquestionably be evidence of express malice, and would destroy the defence in this class of cases.

As the plaintiff has a right to prove express malice in such cases, to sustain his action, notwithstanding the privilege, it follows, of course, that if the defendant attempt to set up his privilege as a defence by a special plea, he must not only plead the fact which rendered it a privileged communication, but he must deny the allegation in the declaration, that the words were maliciously spoken, to enable the plaintiff to go to the jury upon the question of actual malice, if he thinks proper to do so. . . .

The *second class of privileges* embraces words spoken by members of Parliament, or of Congress, or of the State legislature, in the discharge of their official duties in the House, for which no action of slander will lie, however false and malicious may be the charge against the private reputation of an individual. To this class, also, belong complaints made to grand juries and magistrates, charging persons with crimes, for which no action of slander will lie, although express malice as well as the absolute falsity of the charge can be established by proof. But the law has provided a different remedy in cases of that kind, where, in addition to what has before been stated, it can be proved that the party who made the complaint had no probable cause for believing that the charge was true. Upon a full consideration of all the authorities on the subject, I think that the privilege of counsel in advocating the causes of their clients, and of parties who are conducting their own causes, belongs to the same class where they have confined themselves to what was *relevant* and *pertinent* to the question before the court, and that the motives with which they have spoken what was relevant and pertinent to the cause they were advocating cannot be questioned in an action of slander. Thus far it appears to be necessary to extend the privilege for the protection of the rights of the parties; as those rights might sometimes be jeopardized if counsel were restrained from commenting freely upon the characters of witnesses, and the conduct of parties, when such comments were relevant, for fear of being harassed with slander suits, and attempts to prove they were actuated by malicious motives in the discharge of their duty. Such I understand also to be the conclusion at which the Court of King's Bench arrived in the case of the present Lord Chief Baron of the Court of Exchequer. *Hodgson v. Scarlett*, 1 Barn. & Ald. 232; *Holt's N. P.* 621. Although Mr. Holt has attempted to give a statement of what occurred in banc, as well as a report of the case at nisi prius, to understand the decision correctly it is necessary to examine the case in *Barnewall & Alderson*, not only as to the final opinion of the judges, but also as to what occurred in the course of the argument. There was no question as to the fact that the plaintiff was nonsuited upon the opening, by Baron Wood, who held the assizes, without permitting him to go to the jury. He, therefore, had no opportunity to prove express malice, or to have it inferred from the manner in which the charge was made.

His counsel upon the argument insisted that the learned judge had stopped the cause too soon, without hearing the evidence. To this it was answered, that Baron Wood had reported that the counsel at the assizes admitted that the alleged slanderous words were used by the defendant as observations in a cause, and were pertinent to the matter in issue. But as there appeared to have been a misapprehension on this point, the court heard a statement of the proceedings in the original suit from the notes of Mr. Justice Bailey, who tried the cause. The plaintiff's counsel still contended there was a question which ought to have been left to the jury, as they were to say whether there was not malice to be *inferred* from the facts. Upon which Lord Ellenborough immediately inquired if the words were relevant, whether they were not within the protection of law? And it was in answer to this part of the argument that, in delivering his final decision in the cause, he said, although he admitted it might have been too much for the counsel to say that the attorney was wicked and fraudulent, "It appears to me that the words spoken were uttered in the original cause, and were relevant and pertinent to it, and consequently that this action is not maintainable."

I do not understand from this, however, that everything that in any state of facts would be relevant and pertinent to the matter in question before the court, comes within this rule of protection, where those facts which would have rendered it relevant and pertinent do not exist. Thus, if counsel, in the argument of his client's cause, should avail himself of that opportunity to say of a party, or of a witness, against whom there was nothing in the evidence to justify a suspicion of the kind, that he was a thief or a murderer, it might be a proper case for a jury to say whether the counsel was not actuated by malice, and improperly availed himself of his situation as counsel to defame the party or witness. Such appears to have been the opinion of the judges in the case of *Hodgson v. Scarlett*, and such also must have been the opinion of the Supreme Court of this State in the case of *Ring v. Wheeler*, 7 Cowen, 725; for the language of the defendant as stated in any of the seven first counts of the declaration in that case might have been relevant and pertinent, and the words charged in the fourth and sixth counts probably were relevant to the matter before the arbitrators, if the counsel was opening his defence, and merely stating what he expected to prove, according to the case of *Moulton or Boulton v. Clapham*, 1 Rolle's Abr. 87, which was so much relied upon by the counsel for the plaintiffs in error upon the argument of this cause. Upon the authority of that case, perhaps, they should have been considered as relevant and pertinent, even after verdict.

I do not, however, consider the case of *Moulton v. Clapham* as an authority for holding that everything which may be said to the court or jury, by a party or his counsel, in the progress of a cause, as abso-

lutely protected, although it was not relevant or pertinent to the matter in question, so as to preclude the party injured thereby from showing to a jury that the language was used maliciously, and for the mere purpose of defaming him. Many of these old cases are very imperfectly reported, and are therefore apt to mislead us, unless they are examined with care. This case, although it is to be found in D'Anvers, Sir William Jones, March, and in Rolle's Abridgment, is not stated by either two of them in precisely the same way. As reported by Sir William Jones, it would lead us to the conclusion that the court meant to decide that anything said in court by a party in disaffirmance of what was sworn against him was absolutely protected, although found by the jury to have been said maliciously; but by referring to Rolle, it will be seen that the language used by the defendant was addressed to the court, and was a mere statement that the affidavit was untrue, and that he would prove to them by forty witnesses that it was so; and therefore it was holden that the action was not maintainable, as it appeared from the plaintiff's declaration that the answer as made by the defendant to the affidavit was spoken merely in defence of himself, and in a legal and judicial way, "inasmuch as he said he would prove it by forty witnesses." Neither is the dictum of Cromwell's Chief Justice of the Upper Bench (Style's R. 462) to be taken as broadly as stated by the reporter, without knowing the state of facts in reference to which the dictum was applied. I presume he must have used this language in reference to words spoken by counsel in opening the defence of his client's cause to the jury, stating what he should prove. For he immediately adds, "It is his duty to speak for his client, and it shall be intended to be spoken according to his client's instructions." But surely no one can for a moment suppose the learned Chief Justice intended to say that it was the duty of counsel to say anything that was not relevant to the matter in question; or to go beyond the case for the purpose of maligning a witness or the adverse party, although he might have been instructed to do so by his client. As I understand the case of *Brook v. Montague*, Cro. Jac. 90, the plea must have alleged that the words were spoken by the counsel in relation to the evidence which was *to be given* in favor of the jury against Brook, who had attainted them. He probably was instructed by his client that Brook had been convicted of felony; and if so, he was probably incapable of proceeding in the attaint against the jury, as the law then stood. Coke Litt. 130 a; *Sleight v. Kane*, 2 Johns. Cas. 236. The language of the reporter is, that the counsel spoke the words *in evidence*. This certainly could not be so, as there was no pretence that the counsel was a witness on the trial. I have no doubt, therefore, that the language of the plea was that the counsel, in reference to the matters *to be given in evidence*, spoke the words mentioned in the plaintiff's declaration, &c., and that by a slip of the reporter's

pen, or otherwise, a part of the sentence is left out in the printed report. The case of *Badgley v. Hedges*, 1 Penning. R. 233, is like that of *Moulton v. Clapham*; for it is evident the defendant spoke in reference to the contradictory evidence which he intended to give in the cause, or which he had already given. If so, what he said was relevant, although perhaps not said at the right time. I am satisfied, therefore, that there is no law, either ancient or modern, which affords complete protection to parties or counsel, so as to bring the language used by them in the course of judicial proceedings within the second class of privileged communications which I have stated, except where the words complained of as slanderous were relevant or pertinent to the question to be determined by the court or jury.

There may be cases which properly belong to the first class of privileged communications, arising in the course of judicial proceedings. Parties, and even counsel sometimes, misjudge as to what is relevant and pertinent to the question before the court, and especially parties who are not much acquainted with judicial proceedings; and it may be very proper in such cases to leave it as a matter of fact for the jury to determine, whether the words were spoken in good faith, under a belief that they were relevant or proper, or whether the party using them was actuated by malice and intended to slander the plaintiff. The case of *Allen v. Crofoot*, 2 Wendell, 516, appears to be a case of this kind, for it is evident that words spoken were not relevant in the judicial proceeding, or pertinent to any question then before the court. But as circumstances showed that the defendant either supposed he was bound to answer the question, or that it was relevant and pertinent to the proceedings, I think the court very properly decided that it should have been left to the jury to determine whether the defendant acted in good faith, supposing it was relevant and proper to answer the question put to him by the plaintiff, although he had not yet been sworn as a witness on the examination of the complaint which he had previously made on oath, or whether he was actuated by malice. In cases belonging to that class of privileged communications, malice in fact may be inferred from the language of the communication itself, as well as from extrinsic evidence. *Wright v. Woodgate*, 1 Gale's R. 329.

But though the slanderous words were spoken in the course of a judicial proceeding, and were relevant and pertinent to the matter in question, or the defendant may have used them in good faith supposing them to be pertinent, without actual malice or any intention of slandering the plaintiff, yet if the facts do not appear from the pleadings or the finding of the jury, it will not aid the defendant upon a motion in arrest of judgment. On such a motion the court cannot know that the slanderous words were pertinent, or that the plaintiff did not satisfy the jury that they were not only pertinent to the matter in question before the court, but also that the defendant spoke

them with a malicious intent, for the mere purpose of defaming the plaintiff and wounding his feelings. Such is the effect of the decision of the Supreme Court both in the case of *McClaghry v. Wetmore*, 6 Johns. R. 82, decided nearly thirty years ago, and the more recent case of *Ring v. Wheeler*, to which I have before referred.

Each of the counts in the plaintiff's declaration in this case contains more or less slanderous expressions, imputing the crime of perjury, in language which *prima facie* could not have been *pertinent* to any question before the court, for it does not appear to have been addressed to the court, but to the plaintiff himself, who was a witness there; and if the plaintiff used all the abusive language towards or in reference to the witness which is stated in either of those counts, although some of it might have been relevant to the matter in question, no jury could hesitate in coming to a correct conclusion whether that which was not pertinent was uttered in good faith or with a malicious intent to defame the plaintiff; although the defendant must have proved that he had great provocation to excuse all this harsh language, or no honest jury could have given a verdict of only six cents against him.

The defence in this case is set up by several special pleas in addition to the general issue; and the objection urged by the third point of the plaintiff in error is, that although the declaration may have been *prima facie* sufficient, the replications are bad, and sufficient is admitted upon the whole record to constitute a good defence. On the other hand, it is urged that if there are any immaterial issues the pleas are bad, and as the defendant committed the first fault in pleading, it is not a case for a repleader. I have examined the special pleas particularly, and think either of them would have been held good upon general demurrer, if I am correct in the conclusion at which I have arrived as to the law of the case. It is expressly stated by Mr. Justice Buller that the defendant may, by way of justification, plead that the words were spoken by him as counsel in a cause, and that they were pertinent to the matter in question, *or* he may give them in evidence under the general issue, for they prove him not to have been guilty of speaking the words maliciously. Bull. N. P. 10. See also Lord Cromwell's Case, 4 Coke's R. 14. The two first special pleas, therefore, showing that slanderous words stated in the declaration were spoken by the defendant in the judicial proceeding, while conducting his own defence without counsel, and that they were *pertinent* to the matter in question, constituted a good bar to the action, as they brought the case within the second class of privileged communications which I have noticed. To each of these pleas there were two replications (as authorized by the Revised Statutes upon a special application to the court), each of which replications was a good answer to the plea: one replication traversed the fact that the words spoken were either pertinent or material to the matter in

question, and the other traversed the allegation in the plea that the words were used by the defendant in the matter in question before the justice, *while conducting his defence* therein; and as the jury found a verdict for the plaintiff on all the issues, neither of those pleas can aid the defendant. In the last special plea the defendant, in addition to the facts stated in the two preceding pleas, also averred that the words were spoken without any malice towards the plaintiff, and therefore, if I am right in supposing that a party is not answerable for words innocently spoken by him in conducting his defence in a judicial proceeding, and without malice, although they may not have been strictly pertinent, perhaps a replication *merely denying the pertinency* of the words would not have been a sufficient answer to this plea. The first replication to this plea does, however, in substance, put in issue the question of malicious intent as well as the pertinency of the slanderous words, although the malice is only stated by way of inducement to the traverse of the malicious intent. As that part of the replication directly negatives the allegation in the plea which it was material to negative in connection with the traverse of the pertinency of the slanderous words, its effect, after verdict, must be different from the case of a replication which merely sets up new matter as inducement to the traverse, and then traverses an immaterial allegation in the plea, leaving that which was most material unanswered. It is in this case, at most, but a misjoinder of the issue, which is cured after verdict; and the jury have found in terms, in reference to this issue, that the words were spoken *falsely* and *maliciously*, and that they were *not pertinent* and material. Again, the second replication to this plea is a full answer to it, even if the first replication is stricken entirely out of the record; and upon the last replication the jury have found that the slanderous words were not uttered by the defendant while conducting his own defence on the examination before the justice, as alleged in his last special plea.

For these reasons I think the Supreme Court were right in refusing to arrest the judgment, and that their decision should be affirmed.

The court being unanimously of the same opinion, the judgment of the Supreme Court was accordingly

Affirmed.

MERIVALE v. CARSON.

Court of Appeal of England, 1887. 20 Q. B. D. 275.

APPEAL by the defendant against the refusal of a Divisional Court to allow a new trial or to enter judgment for the defendant.

The action was brought to recover damages in respect of an alleged libel. At the trial before Field, J., it appeared that the plaintiff and

his wife were the joint authors of a play called "The Whip Hand." The defendant was the editor of a theatrical newspaper called "The Stage." Early in May, 1886, the play was performed at a theatre in Liverpool. On May 7, a criticism of the play was published in the defendant's newspaper. The part of the article charged to be libellous was as follows:—

"The Whip Hand, the joint production of Mr. and Mrs. Herman Merivale, gives us nothing but a hash-up of ingredients which have been used ad nauseam, until one rises in protestation against the loving, confiding, fatuous husband with the naughty wife and her double existence, the good male genius, the limp aristocrat, and the villainous foreigner. And why dramatic authors will insist that in modern society comedies the villain must be a foreigner, and the foreigner must be a villain, is only explicable on the ground, we suppose, that there is more or less of romance about such gentry. It is more in consonance with accepted notions that your Continental croupier would make a much better fictitious prince, marquis, or count than would, say, an English billiard-marker or stable-lout. And so the Marquis Colonna in *The Whip Hand* is offered up by the authors upon the altar of tradition and sacrificed in the usual manner when he gets too troublesome to permit of the reconciliation of husband and wife, and lover and maiden, and is proved, also much as usual, to be nothing more than a kicked-out croupier."

The innuendo suggested was that the article implied that the play was of an immoral tendency. It was admitted that there was no adulterous wife in the play.

Field, J., in the course of his summing-up to the jury, said: "The question is first, whether this criticism bears the meaning which the plaintiffs put upon it. If it is a fair, temperate criticism, and does not bear that meaning, then your verdict will be for the defendant. . . . It is not for a moment suggested by any one that the defendant is animated by the smallest possible malice towards the plaintiffs. . . . The malice which is necessary in this action is one which, if it existed at all, will be because the defendant has exceeded his right of criticism upon the play. You have the play before you; you must judge for yourselves. If it is no more than fair, honest, independent, bold, even exaggerated criticism, then your verdict will be for the defendant. It is for the plaintiffs to make out their case. They have to satisfy you that it is more than that; otherwise they cannot complain. If you are satisfied upon the evidence that it is more than that, then you will give your verdict for the plaintiffs."

The jury found a verdict for the plaintiffs with one shilling damages, and the judge entered judgment for the plaintiffs accordingly, and declined to deprive them of costs.

The defendant appealed.

LORD ESHER, M. R. This action is brought in respect of an alleged

libel contained in a criticism by the defendant upon a play written by the plaintiffs. The first thing to be considered is, what are the questions which in such a case ought to be left to the jury. The first question to be left to them is, what is the meaning of the alleged libel? The jury must look at the criticism, and say what in their opinion any reasonable man would understand by it. I am not prepared to say that in coming to their conclusion they would not also have to look at the work criticised. That, however, is not very material for us to consider now. The proper question was put to the jury in the present case.

Two interpretations of the defendant's article were placed before them. One was that it meant that the play is founded upon adultery, without containing any stigma on the fact that it is so founded. The defendant's article is alleged to be libellous in that it attributed to the plaintiffs that they had written a play founded upon adultery, without any objection to it on their part, in other words, that they had written an immoral play. On behalf of the defendant it was said that the article had no such meaning, that the expression "naughty wife" does not mean "adulterous wife." It would not have that meaning in every case, but the question is whether, looking at the context of the article, it has that meaning. If the court should come to the conclusion that the expression could not by any reasonable man be thought to have that meaning, they could overrule the verdict of the jury; otherwise the question is for the jury.

What is the next question to be put to the jury? Are they to be told that the criticism of a play is a privileged occasion, within the well-settled meaning of the word "privilege," and that their verdict must go for the defendant unless the plaintiff can prove malice in fact, that is, that the writer of the article was actuated by an indirect or malicious motive? I think it is clear that that is not the law, and that it was so decided in *Campbell v. Spottiswoode*, 3 B. & S. 769, which has never been overruled. All the judges, both before and ever since that case, have acted upon the view there expressed, that a criticism upon a written published work is not a privileged occasion. Blackburn, J., in his judgment, shows why it is not a privileged occasion. A privileged occasion is one on which the privileged person is entitled to do something which no one who is not within the privilege is entitled to do on that occasion. A person in such a position may say or write about another person things which no other person in the kingdom can be allowed to say or write. But in the case of a criticism upon a published work every person in the kingdom is entitled to do and is forbidden to do exactly the same things, and therefore the occasion is not privileged.

Therefore the second question to be put to the jury is, whether the alleged libel is or is not a libel. The form in which that question should be put is, I think, best expressed by Crompton, J., in *Camp-*

bell *v.* Spottiswoode, 3 B. & S. at p. 778. He says: "Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men, or the proceedings in courts of justice, or in Parliament, or the publication of a scheme, or a literary work. But it is always to be left to the jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not entitled to overstep those limits and impute base and sordid motives which are not warranted by the facts; and I cannot for a moment think because he has a bona fide belief that he is publishing what is true, that is any answer to an action for libel." He says that upon the answer to the question there stated it depends whether the article upon which the action is brought is or is not a libel. The question is not whether the article is privileged, but whether it is a libel.

What is the meaning of a "fair comment"? I think the meaning is this: Is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case.

I think the right question was really left by Field, J., to the jury in the present case. No doubt you can find in the course of his summing-up some phrases which, if taken alone, may seem to limit too much the question put to the jury. But when you look at the summing-up as a whole, I think it comes in substance to the final question which was put by the judge to the jury: "If it is no more than fair, honest, independent, bold, even exaggerated criticism, then your verdict will be for the defendants." He gives a very wide limit, and I think rightly. Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this,—would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised? If it goes beyond that, then you must find for the plaintiff; if you are not satisfied that it does, then it falls within the allowed limit, and there is no libel at all.

I cannot doubt that the jury were justified in coming to the conclusion to which they did come, when once they had made up their

minds as to the meaning of the words used in the article, viz., that the plaintiffs had written an obscene play, and no fair man could have said that. There was therefore a complete misdescription of the plaintiffs' work, and the inevitable conclusion was that an imputation was cast upon the characters of the authors. Even if I had thought that the right direction had not been given to the jury, I should have declined to grant a new trial, for the same verdict must inevitably have been found if the jury had been rightly directed.

Another point which has been discussed is this: It is said that if in some other case the alleged libel would not be beyond the limits of fair criticism, and it could be shown that the defendant was not really criticising the work, but was writing with an indirect and dishonest intention to injure the plaintiffs, still the motive would not make the criticism a libel. I am inclined to think that it would, and for this reason, that the comment would not then really be a criticism of the work. The mind of the writer would not be that of a critic, but he would be actuated by an intention to injure the author.

In my opinion this appeal must be dismissed.

BOWEN, L. J. . . . The criticism is to be "fair;" that is, the expression of it is to be fair. The only limitation is upon the mode of expression. In this country a man has a right to hold any opinion he pleases, and to express his opinion provided that he does not go beyond the limits which the law calls "fair;" and although we cannot find in any decided case an exact and rigid definition of the word "fair," this is because the judges have always preferred to leave the question what is "fair" to the jury. . . . It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism.

In the case of literary criticism it is not easy to conceive what would be outside that region, unless the writer went out of his way to make a personal attack on the character of the author of the work which he was criticising. In such a case the writer would be going beyond the limits of criticism altogether, and therefore beyond the limits of fair criticism. *Campbell v. Spottiswoode*, 3 B. & S. 769, was a case of that kind, and there the jury were asked whether the criticism was fair, and they were told that, if it attacked the private character of the author it would be going beyond the limits of fair criticism. Still there is another class of cases in which, as it seems to me, the writer would be travelling out of the region of fair criticism,—I mean if he imputes to the author that he has written something which in fact he has not written. That would be a misdescription of the work. There is all the difference in the world between saying that you disapprove of the character of a work, and that you think it has an evil tendency, and saying that a work treats adul-

tery cavalierly when in fact there is no adultery at all in the story. A jury would have the right to consider the latter beyond the limits of fair criticism.

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Appeal dismissed.

DAVIS & SONS v. SHEPSTONE.

Privy Council of England, March, 1886. 11 A. C. 187.

THE case is stated in the opinion.

LORD HERSCHELL, L. C. This is an appeal from a judgment of the Supreme Court of the Colony of Natal refusing a new trial in an action brought against the appellants in which the respondent obtained a verdict for £500 damages.

The action was brought to recover damages for alleged libels published by the appellants in the NATAL WITNESS newspaper in the months of March and May, 1883.

The respondent was, in December, 1882, appointed Resident Commissioner in Zululand, and proceeded in the discharge of his duties to the Zulu reserve territory. In the month of March, 1883, the appellants published in an issue of their newspaper serious allegations with reference to the conduct of the respondent whilst in the execution of his office in the reserve territory. They stated that he had not only himself violently assaulted a Zulu chief, but had set on his native policemen to assault others. Upon the assumption that these statements were true, they commented upon his conduct in terms of great severity, observing, "We have always regarded Mr. Shepstone as a most unfit man to send to Zululand, if for no other reason than this, that the Zulus entertain towards him neither respect nor confidence. To these disqualifications he has now, if our information is correct, added another which is far more damnatory. Such an act as he has now been guilty of cannot be passed over, if any kind of friendly relations are to be maintained between the colony and Zululand. There are difficulties enough in that direction without need for them to be increased by the headstrong and almost insane imprudence and want of self-respect of the official who unworthily represents the government of the Queen."

In the same issue, under the heading "Zululand," there appeared a statement that four messengers had come from Natal to Zululand, from whom details had been obtained of the respondent's treatment of certain chiefs of the reserved territory who had visited Cetewayo, and, what purported to be the account derived from these messengers of the assault and abusive language of which the respondent had been guilty, was given in detail.

On the 16th of May, 1883, the appellants published a further article, relating to the respondent, which commenced as follows:—“Some time ago, we stated in these columns that Mr. John Shepstone, whilst in Zululand, had committed a most unprovoked and altogether incomprehensible assault upon certain Zulu chiefs. At the time the statement was made a good deal of doubt was thrown upon the truth of the story. We are now in a position to make public full details of the affair, which the closest investigation will prove to be correct. A representative of this journal, learning that a deputation had come to Natal to complain of the attack, met five of the number, and in the presence of the competent interpreters took down the stories of each man.”

The article then gave at length the statements so taken down, which disclosed, if true, the grossest misconduct on the part of the respondent. It was in respect of these publications of the appellants that the action was brought by the respondent.

The appellants by their defence averred that the conduct of the plaintiff as British Resident Commissioner was a matter of general public interest affecting the territory of Natal, and that the alleged libels constituted a fair and accurate report of the information brought to the Governor of Natal and published in the colony by messengers from Zululand and its King as to the conduct of the plaintiff in the discharge of the duties of his office, and a fair and impartial comment upon the conduct of the plaintiff in his public capacity published bona fide and without malice.

The case came on for trial before Mr. Justice Wragg and a jury on the 4th of September, 1883, when it was proved that the allegations of misconduct made against Mr. Shepstone were absolutely without foundation, and no attempt was made to support them by evidence. It appeared that the messengers from whom the statements contained in the issue in March were derived had come from Zululand to see the Bishop of Natal, and that their statements had been conveyed to the editor of a newspaper by a letter from the bishop. The statements contained in the issue of May were communicated by a Mr. Watson, who was connected with the staff of the newspaper, and who had sought and obtained an interview with certain Zulus when on their way to convey a message from the King to the Governor of Natal.

At the close of the evidence the learned judge summed up the case to the jury, who returned a verdict for the plaintiff, the present respondent, for £500.

Application was afterwards made to the Supreme Court to grant a new trial, but this application was refused, and the present appeal was then brought. The appellants rested their appeal upon two grounds, first, that the learned judge misdirected the jury in leaving to them the question of privilege and in not telling them that the occasion was a privileged one. The second ground insisted upon was that the

damages were excessive. Their Lordships are of opinion that the contention that the learned judge ought to have told the jury that the occasion was a privileged one, and that the plaintiff could only succeed on proof of express malice, is not well founded.

There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.

In the present case the appellants, in the passages which were complained of as libellous, charged the respondent, as now appears without foundation, with having been guilty of specific acts of misconduct, and then proceeded on the assumption that the charges were true, to comment upon his proceedings in language in the highest degree offensive and injurious; not only so, but they themselves vouched for the statements by asserting that though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their Lordships' opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege.

It was insisted by the counsel for the appellants that the publications were privileged, as being a fair and accurate report of the statements made by certain messengers from King Cetewayo upon a subject of public importance. It has, indeed, been held that fair and accurate reports of proceedings in Parliament and in Courts of Justice are privileged, even though they contain defamatory matter affecting the character of individuals.

But in the case of *Purcell v. Sowler*,¹ the Court of Appeal expressly refused to extend the privilege even to the report of a meeting of poor law guardians, at which accusations of misconduct were made against their medical officer. And in their Lordships' opinion it is clear that it cannot be extended to a report of statements made to the Bishop of Natal, and by him transmitted to the appellants, or to statements made to a reporter in the employ of the appellants, who for the purposes of the newspaper, sought an interview with messengers on their way to lay a complaint before the governor.

The language used by the learned judge in summing up the present case to the jury is open to some criticism, and does not contain so clear and complete an exposition of the law as might be desired. But in their Lordships' opinion, so far as it erred, it erred in being too

¹ 2 C. P. D. 215.

favorable to the appellants, and it is not open to any complaint on their part.

The only question that remains is as to the amount of damages. The assessment of these is peculiarly the province of the jury in an action of libel. The damages in such an action are not limited to the amount of pecuniary loss which the plaintiff is able to prove. And their Lordships see no reason for saying that the damages awarded were excessive or for interfering with the finding of the jury in this respect.

They will, therefore, humbly advise Her Majesty that the judgment appealed against should be affirmed and the appeal dismissed with costs.

Judgment affirmed.

CHAPTER XIII.

TRESPASS.

BROWN v. MANTER.

Supreme Court of New Hampshire, July, 1851. 22 N. H. 468.

TRESPASS, for breaking and entering the plaintiff's close, particularly described in the writ, situated in Auburn, and cutting down and carrying away twelve of the plaintiff's trees there growing, and five cords of the plaintiff's wood; and other wrongs, &c.

Plea, the general issue.

It was admitted upon the trial, that the defendant cut down, upon the land described in the plaintiff's writ, seven pine trees of the value of two dollars and twenty cents each, and drew them away.

In support of his title the plaintiff offered in evidence a deed from Benjamin Pierce and Samuel Pierce to Nathaniel Brown, dated September 27, 1777. This deed did not appear to have been acknowledged, or the execution of it proved, but it appeared to have been recorded February 10th, 1847. The defendant objected to its admission, solely on the ground that it had not been acknowledged, but the Court admitted it, subject to that exception.

It appeared that the plaintiff claimed the westerly part of the land described in his writ, by virtue of this deed; being a different title from that under which he claimed the residue. The precise location of the land conveyed by that deed being uncertain, it was a question for the jury whether the trees were cut on that part or not; but there was no doubt that the defendant drew the same trees across a part of the land described in that deed; and the plaintiff contended, that if the jury found that the trees were not cut on his land, still he was entitled to recover some damages for the trespass in drawing them across his land.

The defendant requested the Court to instruct the jury that if the plaintiff did not own the land where the trees stood he could not recover, that being the place where the only injury alleged was done. But the Court declined to give such instruction, and the defendant excepted.

The jury found a verdict for the plaintiff for nine dollars damages, and the defendant moved to set it aside by reason of said exceptions. And the questions arising upon said motion were reserved and assigned to this Court for determination.

EASTMAN, J. The exception taken to the deed from the *Pierces* to *Brown* cannot prevail. The object of the enrolment of a deed is to give public notice to all, of the sale and transfer of the property conveyed. So far as the parties are concerned or those who have notice of the existence of the deed, the enrolment is not essential to its validity. The statute of enrolments was enacted for the benefit of subsequent purchasers and creditors, and not for the benefit of wrongdoers or strangers. But an attachment or purchase, made with the knowledge of the existence of a prior unrecorded deed, secures no rights against the holder of such deed. Such is the general doctrine, and the authorities to the point are numerous. *Jackson v. Burgett*, 10 Johns. Rep. 457; *Jackson v. Page*, 4 Wendell, 585; *Jackson v. Leek*, 19 Wendell, 339; *Connecticut v. Brandish*, 14 Mass. 300; *Adams v. Cuddy*, 13 Pick. Rep. 460; *Bush v. Golden*, 17 Conn. Rep. 594; *Butler v. Stevens*, 26 Maine Rep. 484; *Corliss v. Corliss*, 8 Vermont Rep. 373; *Garwood v. Garwood*, 4 Halsted, (N. J.) Rep. 193; *Ohio Life Ins. Co. v. Ledyard*, 8 Alabama Rep. 866; *Irvin v. Smith*, 17 Ohio Rep. 226; *McFall v. Sherrard*, 1 Harper, (S. C.) Rep. 295; *Boling v. Ewing*, 9 Dana, (Ken.) Rep. 76; *Currie v. Donald*, 2 Wash. (Vir.) Rep. 58; *Montgomery v. Dorion*, 6 N. H. Rep. 250; *Odiorne v. Mason*, 9 N. H. Rep. 24.

The acknowledgment of a deed is the evidence upon which the Register acts in making the record; and the object of the acknowledgment is to procure the enrolment. Until acknowledged it is not a proper matter for record. But, as between the parties to the deed, the acknowledgment adds nothing to its validity. Against the grantor and his heirs, and also against a stranger having knowledge of its existence, the original instrument may be introduced in evidence without acknowledgment. *Wark v. Willard*, 13 N. H. Rep. 389; *Odiorne v. Mason*, 9 N. H. Rep. 24; *Montgomery v. Dorion*, 6 N. H. Rep. 250; *Dole v. Thurlow*, 12 Met. Rep. 157; *Blood v. Blood*, 23 Pick. 80; *Marshall v. Fiske*, 6 Mass. Rep. 30; *Doe v. Reed*, 2 Scam. (Ill.) Rep. 371; *Strong v. Smith*, 3 McLean, (Ind.) Rep. 362.

Upon the facts presented in this case, the ruling of the Court in admitting the deed in evidence was correct.

Neither can the exception be sustained which was taken to the ruling of the Court, declining to instruct the jury, that if the plaintiff did not own the land where the trees stood, he could not recover.

The gist of the action of trespass is the disturbance of the possession. If the close is illegally entered, a cause of action at once arises. Whatever is done after the breaking and entering is but aggravation of damages. *Taylor v. Cole*, 3 Term. Rep. 292; *Van Lenven v. Like*, 1 Comstock's Rep. 515; *Smith v. Ingram*, 7 Iredell Rep. 175; *Dobbs v. Gallidge*, 4 Dev. & Batt. Rep. 68; *Wendell v. Johnson*, 8 N. H. Rep. 222; *Ferrin v. Simonds*, 11 N. H. Rep. 263. Trespass lies for every unlawful intrusion, though only the grass be trodden down. 1 Dev.

& Batt. Rep. 371. And in trespass for breaking the plaintiff's close and cutting down his trees, if the plaintiff fail to prove the cutting of his trees, he may still recover for the breach of his close. *Mundell v. Perry*, 2 Gill & Johns. Rep. 193; *Curtis v. Groat*, 6 Johns. Rep. 168.

If the defendant had any right to cross the land he should have pleaded it, or made it appear in some legal way.

Judgment on the verdict.

HAYTHORN v. RUSHFORTH.

Supreme Court of New Jersey, September, 1842. 19 N. J. 160.

THIS was an action of replevin brought in the Circuit Court of the county of Hudson, to recover certain machinery for the manufacturing of woollen goods.

The defendants pleaded non cepit, and property in themselves. The cause was tried at the last December term of that court, a verdict rendered for the plaintiff on both issues, and his damages assessed at three hundred dollars.

After the plaintiff had rested, the defendants' counsel moved for a nonsuit, upon the ground that there was not sufficient evidence of a wrongful taking to sustain the action. The motion was overruled, with permission however to the defendants to obtain the advisory opinion of this court upon the question. Whereupon the case was certified, according to the statute.

WHITEHEAD, J. The case shows the following state of facts: The plaintiff and one John Buckley were originally the joint owners of the machinery in question; and on the dissolution of the co-partnership between them in October, 1836, the plaintiff sold and assigned all his right and interest therein to Buckley, who thereby became the sole owner thereof. In the spring of 1837, Buckley rented a building of the defendants in the township of Lodi, in the then county of Bergen, and removed the machinery into it. He was engaged for some time in manufacturing goods for the defendants at a given sum per yard, they finding the stock, and he furnishing the labor and machinery. The defendants soon after this arrangement became insolvent, and failing to fulfil their part of the contract in furnishing the materials, the parties made another arrangement, by which "the defendants were to work the machinery, part of the time towards the rent of the building, and Buckley to do any country work that might offer." He stopped manufacturing in the summer of 1837, but retained the key of the building and had the control of the machinery until November or December of that year, and until the same was demanded by the plaintiff as hereinafter mentioned.

On the 4th of November, 1837, Buckley being indebted to the plain-

tiff, executed to him a bill of sale of the machinery, at which time, he says, he considered himself in the possession of it. One or two weeks after this, the plaintiff went to the factory of the defendants in company with Buckley, and demanded the machinery of Rushforth. The plaintiff said "I have come after the machinery" and exhibited to him the bill of sale. Rushforth refused to deliver it, saying, it should not go out of the factory until they got others in the place of it. Buckley was present and consented that the plaintiff should take it.

Under this state of facts, the defendants insisted, that the goods had not been tortiously taken, and consequently that replevin would not lie. Whether tortiously taken or not, depends in some measure upon the possession of the goods by Buckley at the time of the execution of the bill of sale.

It is manifest from the evidence, that Buckley, at the time of the execution of the bill of sale to the plaintiff, was the absolute owner of the machinery; and if not in the actual possession thereof, he was so constructively. He considered himself in the possession of it. It was in a building he had rented of the defendants, the key of which he retained. By the last arrangement between the parties, after the defendants had failed in the business, the defendants were only permitted to use the machinery when Buckley had no use for it. There was nothing in this arrangement which gave to the defendants any right or power over it, affecting Buckley's right to use, sell or deliver it. When the plaintiff exhibited his bill of sale, and demanded the machinery, the defendants did not question his right of property, nor did they assert any right to the possession. They refused to suffer it to be removed, until its place was supplied by other machinery, thereby placing their refusal, not upon a claim of right, but upon the ground of inconvenience to themselves.

Under this evidence, it appears to me, Buckley must be considered, at the time of the execution of the bill of sale, as having, beyond all question, the constructive possession of the machinery; and by the bill of sale, the plaintiff succeeded to all his rights, both of property and possession.

Now it has been repeatedly ruled, that a general property in goods, with the constructive possession thereof, that is to say, a right to reduce them to possession at pleasure, is sufficient to maintain either trespass or replevin.

The case of *Dunham v. Wyckoff*, 3 Wend. 280, came before the court upon a demurrer to the avowry of the defendant, in which he avowed the taking of the goods in question, as sheriff, by virtue of a writ of execution against one Griswold, as the goods and chattels of Griswold, the same being in the possession of Griswold. The pleadings admitted, that at the time of the taking, the property was in the plaintiff, and the possession in Griswold, the defendant in execution. The ques-

tion was, whether replevin would lie. The court say, "replevin lies where trespass de bonis asportatis will lie. The plaintiff must have property general or special, and possession either actual or constructive. The plaintiff having the property in the goods in question, had the constructive possession; for the property draws to it the possession. The plaintiff therefore had the right to take possession at pleasure, and could have sustained trespass: and replevin and trespass in such cases are concurrent remedies."

The plaintiff then being the absolute owner, and in the constructive possession of the machinery; did the conduct of the defendants, at the time the demand was made, amount in law to a tortious taking thereof or was it such an interference with the property, as would entitle the plaintiff to maintain an action of trespass against them?

The evidence is, that when the plaintiff exhibited his bill of sale and demanded the machinery, the defendant Rushforth *refused to deliver it, saying, it should not go out of the factory until they got others in the place of it.* Here was an unlawful intermeddling with the property; an exercise, or claim of dominion over it, without any pretence of authority or right. This without a manual seizing of the property is sufficient in law, to constitute a tortious taking; 7 Cowen Rep. 735;¹ 10 Wend. R. 349;² 23 Wend. R. 462;³ 15 Wend. R. 631;⁴ and consequently renders them liable to an action of trespass or replevin.

It is not necessary to the decision of the question in this cause, to express an opinion upon another point raised by the plaintiff's counsel, whether the action of replevin in this state may not be sustained for a wrongful detention, when the taking was not tortious.

The Supreme Court of Massachusetts hold, that the action lies for goods unlawfully detained though there was no tortious taking. 15 Mass. Rep. 284;⁵ 16 Mass. Rep. 147.⁶ In the last case Putnam, judge, is of opinion, that one may be considered constructively taking goods, who came lawfully into possession, but keeps them from the owner against right. Chief Justice Savage, in reference to these decisions, remarks in *Marshall v. Davies*, 1 Wend. 109, "were the question new in this court, I should be strongly inclined to hold the doctrine of the Massachusetts Court correct."

There is a strong disposition in courts to favor this action, as it furnishes a more adequate remedy than trespass or trover; and not unfrequently it is the only effectual remedy for the party injured. In the language of the late Chief Justice Ewing, 6 Halst. 374,⁷ "the

¹ *Wintringham v. Lafoy.*

² *Allen v. Crary.*

³ *Connah v. Hale.*

⁴ *Fonda v. Van Horne.*

⁵ *Budger v. Philney*, 15 Mass. 359.

⁶ *Baker v. Fales.*

⁷ *Bruen v. Ogden*, 6 Halst. 370.

remedy by replevin is prompt, efficacious and beneficial, and the use of it on proper occasions should be rather fostered than repressed."

ELMER, J., delivered a concurring opinion.

The Circuit Court advised to give judgment for the plaintiff.

CAMPBELL *v.* ARNOLD.

Supreme Court of New York, August, 1806. 1 Johns. R. 511.

THIS was an action of trespass quare clausum fregit. The cause was tried at the Washington circuit, the 11th June, 1806. On the trial the plaintiff proved, that in the year 1776, he was in the actual possession of the premises on which the trespass was committed; that the defendant entered on the land in question, and cut down, took and carried away thirteen pine trees; that at the time of the trespass, one Archibald was in possession of the land, as a tenant under the plaintiff, to whose agent he paid rent. The counsel for the defendant moved for a nonsuit, on the ground, that, as the plaintiff was not in the actual possession of the premises, which were in the occupation of his tenant at the time the trespass was committed, he could not maintain the present action. The objection was overruled by the judge, and the jury found a verdict for the plaintiff.

A motion was now made to set aside the verdict for the misdirection of the judge.

PER CURIAM. The rule appears to have been long and well established, that there must be a possession *in fact* of the real property to which the injury was done, in order to entitle a party to maintain an action of trespass quare clausum fregit. A general property, in the case of real estate, is not, as in the case of personal, sufficient to support this action. Admitting the fee of the land to be in the plaintiff, his remedy for an injury to the freehold must be either against his tenant, or against the defendant, in a different form of action. 3 Wooddeson, 193, 194. 3 Lev. 209. 6 Bac. Abr. 566, new edit. and cases there cited. The verdict must, therefore, be set aside, and a new trial granted, with costs to abide the event of the suit.

New trial granted.

TOBEY *v.* WEBSTER.

Supreme Court of New York, November, 1808. 3 Johns. R. 468.

THIS was an action of trespass quare clausum fregit, and for taking and carrying away a house. The cause was tried at the Greene circuit, in June, 1805, before Mr. Justice Thompson.

The premises on which the trespass was alleged to have been committed were leased on the 17th November, 1802, by the plaintiff, to one Barber, for two years. On the 26th July, 1803, Barber gave a writing to the defendant, granting him permission to occupy and improve the premises, as long as the defendant should remain in his (Barber's) employ, and to build an addition to the house of 14 feet square, and keep his cattle in the barn on the premises, free of rent. On the 19th November, 1803, Barber assigned his lease to one Coffin, who re-assigned it to the plaintiff, on the 27th February, 1804. The house in question was erected by the defendant, with materials cut on the premises, and was taken away on the 16th February, 1804, before the reassignment of the lease to the plaintiff. The lease gave a permission to cut timber on the land, for the use of the mill. The defendant was a sawyer employed on the premises; and was employed by Coffin, after the assignment of the lease to him by Barber.

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the above facts.

E. WILLIAMS, for the plaintiff. I shall contend that a reversioner may maintain trespass for any injury done to the freehold, during the possession of the termor; and that where things are severed from the freehold and carried away, an action will lie, *de bonis asportatis*.

SPENCER, J. It was expressly decided in the case of *Campbell v. Arnold*, 1 Johns. Rep. 511,¹ that trespass would not lie by the lessor or owner of the land, while there was a tenant in possession.

KENT, Ch. J. I was at first of a different opinion, but on looking into the cases, I was satisfied that the plaintiff could not maintain an action of trespass, and concurred with the other judge in the opinion delivered. It is unnecessary to argue that point.

WILLIAMS. Then I shall endeavor to distinguish this case from that of *Campbell v. Arnold*. Here the plaintiff was restored to his possession. A disseisee may maintain trespass after a reëntry, for any intermediate damage done to the freehold, for by his reëntry he is restored to his possession, *ab initio*. 3 Bl. Comm. 210. *Viner, Trespass*, T. 5, 6, 7, *ib.* N. 3, 4. The defendant derived no interest in the premises from the plaintiff. He was a mere tenant at will to Barber. He had permission to build a house and occupy it, free of rent; but he had no authority to take it away. The fair inference from the writing given to him by Barber, is, that he was to leave the house on the premises. If such be the true interpretation of the agreement, then the defendant had no right to remove the house. 1 Hen. Black. 259. Barber clearly had no right to build or remove any building, and could not, therefore, give any such right to the defendant. Again, when the house was pulled down, and severed from the land, the materials belonged to the plaintiff. Though a lessee for years may have an action of trespass against a stranger for cutting down trees; yet

¹ *Ante*, p. 485.

he cannot recover the value of the trees, for they are the property of the reversioner. 4 Co. 62, 63, Co. Litt. 57, a. The materials of which the house was built did not belong to the defendant, and he had no right to take them away. The pulling down of the house was waste, and an injury to the freehold. The defendant was a tortfeasor, a wrong doer, and the proper remedy against him is trespass, and not trespass on the case. Though the lessee may have trespass against a man who subverts the land, the lessor also may have trespass for the destruction committed. *Viner*, Trespass, N. 3, 4, Cro. Car. 187. There is no distinction in this respect between a tenant at will, and a tenant for years. Again, the house was a fixture, and so annexed to the freehold that the defendant could not remove it. 3 East, 38.

FRAZIER, contra. It has been settled that no person out of possession, not even the heir at law, can maintain trespass *quare clausum fregit*. 6 Bac. Abr. 566. The doctrine cited from *Viner* does not apply to this case, for as the plaintiff was not in possession, there cannot be a disseisin. The proper remedy for the plaintiff is an action on the case in the nature of waste. Barber had a right to cut trees for the use of the mill; and the defendant had permission to take the timber sawed at the mill, and to build the house. Having erected the house of his own materials, he had a right to remove it during the term, if he could do it without injury to the freehold. Bull. N. P. 34. 1 H. Black. 256. *Lawton v. Salmon*, in notes. There has been no destruction or waste committed, but the premises are left in the same situation in which they were at the time the lease was given to Barber. The defendant cannot be considered as a tenant at will; he was rather a servant or agent under Barber, who was a lessee for years.

YATES, J., delivered the opinion of the court. An action of trespass may be maintained by a landlord against a tenant at will, for waste, because the injury determines the estate, and the possession considered as thereby actually in the landlord. The defendant here is an under tenant of a tenant for years; and the alleged trespass was committed before the expiration of the term. The instrument by which the defendant possessed the premises made him a tenant at the will of the lessee for years, and not at the will of the original lessor; and if the lessee for years, his agents, or sub-tenants, did an injury to the freehold, the lessor might have his remedy against him or the person in default, in another form of action. The assignment or surrender of this lease to the original lessor, before the expiration of the term, does not give him a right to sustain this action. I should rather suppose that, by the assignment, having accepted the premises in the state and condition they were at the time of surrender, he has waived all claim for injuries previously done to the freehold. But it is contended that this assignment and reëntry restores the possession ab

initio, and gives him a right of action. This doctrine only applies in a case of disseisin. The reëntry in such case reduces the possession from the time of the first disseisin, and an action of trespass may be sustained; but here the possession of the defendant was lawful, founded on the original lease, and no disseisin is pretended. I cannot, therefore, distinguish this case from that of *Campbell v. Arnold*, where the court considered the rule as established, that there must be a possession *in fact* of the real property, to which the injury was done, in order to entitle the party to an action of trespass *quare clausum fregit*.

The court are, therefore, of opinion that the verdict ought to be set aside, and that a judgment of nonsuit be entered.

VAN NESS, J., having formerly been concerned as counsel in the cause, declined giving any opinion.

Judgment of nonsuit.

CUTTS v. SPRING.

Supreme Court of Massachusetts, May, 1818. 15 Mass. 135.

TRESPASS *quare clausum fregit*, and for cutting timber on a tract of land in Hiram, in the county of Oxford. On the general issue joined, trial was had at the last October term, before Thatcher, J. The plaintiffs proved the cutting of the trees on the land described, their title to which they derived as follows: In 1771 the government of this then province granted to one Benjamin Prescott a certain tract of land, which he caused to be surveyed and upon which he entered. In 1809 his son, Henry P., conveyed the south-easterly half thereof to the plaintiffs, who entered, and became seised and possessed thereof, including the locus in quo.

The defendants offered to prove that, since the trespass was committed, the Commonwealth had recovered judgment upon an inquest of office against the plaintiffs, upon the ground that they, as assignees of said Benjamin, held and claimed more lands than they were entitled to hold under the said grant; and that commissioners, appointed pursuant to law, had assigned to the plaintiffs a tract of land, being part of what they claimed to hold, but not including the locus in quo. The judge refused to admit this evidence; and a verdict was returned for the plaintiffs, which was to be set aside and a new trial had, if the said evidence ought to have been admitted.

BY THE COURT. The grant of the government to B. Prescott in 1771, and his surveying, fixing the bounds, and entering upon the land, gave him a seisin, although he included more land within his location than his grant conveyed to him. His title descended, with the possession, to his son, and the deed of this latter conveyed the seisin to the plaintiffs in 1809.

It is wholly immaterial to the defendants whether the location cov-

ered more land than the terms of the grant would warrant. The plaintiffs were seised as well as possessed, in regard to every one but the Commonwealth, who might, or might not, reclaim part of the land located, as not conveyed.

The action, therefore, is rightly brought, and the value of the trees is the proper measure of the damages. For the Commonwealth has a right to call the plaintiffs to account, by a suit for the mesne profits, or in some other way; and as the defendants were wrongdoers to the plaintiffs, these latter ought to be in possession of the value of the trees, as a fund to meet the claim of the Commonwealth. If not called upon, they have a right to keep the money for their own use, being accountable to none but the Commonwealth.

Judgment on the verdict.

MURRAY v. HALL.

Common Pleas of England, Hilary Vacation, 1849. 7 C. B. 441.

THIS was an action of trespass for breaking and entering the dwelling-house of the plaintiffs, and expelling them therefrom, and seizing and converting their goods.

The defendant pleaded, first, not guilty; secondly, as to the breaking and entering the dwelling-house, leave and license; thirdly, that the premises were not the premises of the plaintiffs; fourthly, as to the goods, leave and license; fifthly, that the goods were not the goods of the plaintiffs: upon which issue was joined.

The cause was tried before Maule, J., at the sittings at Westminster, in Easter Term, 1847. The facts appearing in evidence were as follows: The three plaintiffs and one Hart had jointly become tenants of the premises in question — a room used as a coffee-room by the members of a temperance society — to one Hall. On the 23d of November, 1846, the defendant and Hart forcibly expelled from the premises a person named Adams, who had been placed there by Murray.

On the part of the defendant it was proved that Hart, on the 5th of November, 1846, surrendered his interest to the defendant by a document of which the following is a copy: —

“MR. W. HALL.

“SIR, — The premises I and my copartners hold of you, being situated No. 11 Stacey Street, St. Giles’s, I, in the name of the same, give up, as we cannot pay you the rent due, my copartners having misapplied the same.

“Yours, &c.,

“JOHN HART.

“P. S. — I have given the key to Mr. G. for you.”

It was then insisted for the defendant that the surrender by Hart at all events inured as a surrender of his own interest, and made Hall tenant in common with the three plaintiffs; and that one tenant in common could not maintain trespass against his companion, even for an actual expulsion. *Cubitt v. Porter*, 8 B. & C. 257; 2 Mann. & R. 627. And see *Wiltshire v. Sidford*, 1 Mann. & R. 403. On the part of the plaintiffs it was objected that, since the new rules, a surrender must be pleaded specially. The learned judge told the jury that, if the evidence satisfied them that there had been an actual expulsion of the plaintiffs from the premises by the defendant, their verdict ought to be for the plaintiffs. The jury returned a verdict for the plaintiffs; damages £35. Rule nisi to enter nonsuit.

COLTMAN, J. This was an action for breaking and entering the plaintiffs' dwelling-house, and expelling them therefrom, to which the defendant pleaded, first, not guilty; secondly, leave and license; thirdly, a denial that the dwelling-house was the plaintiffs'.

At the trial before Maule, J., one ground of defence was that the defendant was tenant in common of the house with the plaintiffs, and that therefore the action was not maintainable. The learned judge told the jury that, if the evidence satisfied them that there had been an actual expulsion of the plaintiffs from the house by the defendant, their verdict ought to be for the plaintiffs. The jury found for the plaintiffs; damages £35.

The defendant afterwards obtained a rule to show cause why a nonsuit should not be entered (pursuant to leave given at the trial), on the ground that one tenant in common cannot maintain trespass against another, even though there has been an actual expulsion.

On showing cause, it was argued (before the Lord Chief Justice, and Justices Coltman, Cresswell, and V. Williams) that this defence, even if sustainable, ought to have been specially pleaded. It is unnecessary to give any opinion on this point, for we are of opinion that the defence is not sustainable.

The court has felt some difficulty on the question, by reason only of the doubts expressed by Littledale, J., in his judgment in *Cubitt v. Porter*, 8 B. & C. 269. That learned judge there said, that although if there has been actual ouster by one tenant in common, ejectment will lie at the suit of the other, yet he was not aware that trespass would lie; for that in trespass the breaking and entering is the gist of the action, and the expulsion or ouster is a mere aggravation of the trespass; and that, therefore, if the original trespass be lawful, trespass will not lie. It appears, however, to us difficult to understand why trespass should not lie, if ejectment (which includes trespass) may be maintained (as it confessedly may) on an actual ouster. And, as it has been further established, in the case of *Goodtitle v. Tombs*, 3 Wils. 118, that a tenant in common may maintain an action of tres-

pass for mesne profits against his companion, it appears to us that there is no real foundation for the doubts suggested.

We are, therefore, of opinion that the direction of Maule, J., at the trial, was right; and consequently this rule must be discharged.

Rule discharged.

NEWKIRK v. SABLER.

Supreme Court of New York, December, 1850. 9 Barbour, 652.

THIS was an action for an assault and battery, tried before Justice Wright, at the Ulster circuit in June, 1849. It appeared that the plaintiff had sent his servant, with a team and wagon, across the farm of the defendant, upon which he entered by taking down the bars, to the house of one Roosa, after the defendant had forbidden the plaintiff's crossing his lands. On the return of the team to the place where it had entered, the bars were found fastened, by boards nailed over them. The servant, after an ineffectual attempt to get through, left the team and wagon on the defendant's land, and went and informed the plaintiff, who came and commenced tearing down the fence for the purpose of taking away his property. The defendant forbade the plaintiff's taking down the fence, but the latter persisting in his attempt, the defendant struck the plaintiff, or struck at him, with a stick. A fight ensued between the parties, in which the plaintiff received the injuries complained of; and both parties were more or less injured. The result was, that the plaintiff got the fence down, and brought away his team.

The judge charged the jury, among other things, that although the team and wagon of the plaintiff were wrongfully on the land of the defendant, it was the duty and right of the plaintiff to get them off, with the least possible injury to the premises; and that the defendant was not justified in using personal violence to prevent him from removing his team from the premises. That the real question for them to determine was, whether the plaintiff was, at the time of the assault, engaged in wanton and unnecessary destruction of the defendant's fences; or whether he was endeavoring, in the most direct way, to remove his team from the premises; that if the jury should be satisfied from the evidence, that the force employed by the defendant was exerted for the purpose of preventing the plaintiff from removing his team from the premises, and not to preserve his fence from unnecessary injury, then they ought to find for the plaintiff. But on the contrary, if they should find that the injury the plaintiff was doing to the fence was unnecessary, and that the defendant committed the acts complained of, for the purpose of preventing such unnecessary injury to the fence, then the verdict should be for the defendant. The counsel for the defendant excepted to so much of the charge, as charged

that it was the duty of the plaintiff, and that he had a right, though his horses and wagon were upon the lands of the defendant, to remove them therefrom; and that the plaintiff was justifiable in breaking down the fence to remove them, if it was necessary to do so for that purpose; and that the defendant would not be justifiable in committing a battery to prevent him from so doing; and to so much of the charge as submitted to the jury the question which, in the opinion of the judge, was the real question for them to try.

The jury found a verdict for \$50 in favor of the plaintiff. From the judgment entered on this verdict, the defendant appealed.

PARKER, J. I think the learned justice erred in holding that the plaintiff had a right to enter upon the lands of the defendant for the purpose of regaining possession of his property.

The right to land is exclusive; and every entry thereon, without the owner's leave, or the license or authority of law, is a trespass. 3 Bl. Com. 209. 18 John. 385. There is a variety of cases where an authority to enter is given by law; as to execute legal process; to distrain for rent; to a landlord or reversioner, to see that his tenant does no waste, and keeps the premises in repair according to his covenant or promise; to a creditor, to demand money payable there; or to a person entering an inn for the purpose of getting refreshment there. 3 Black. Com. 212. 1 Cowen's Tr. 411. In some cases, a license will be implied; as if a man make a lease, reserving the trees, he has a right to enter and show them to the purchaser. 10 Co. 46. Where the owner of the soil sells the chattel being on his land. As if he sells a tree, a crop, a horse, or a fanning mill, which remain within his close; he at the same time passes to the vendee, as incident to such sale, a right to go upon the premises and take away the subject of his purchase, without being adjudged a trespasser. 1 Cowen's Tr. 367. Bac. Abr. Trespass F. 11 East. 366. 2 Roll. Abr. 567 m. n. 1. And if a man, in virtue of his license, erects a building on another's land, this license cannot be revoked so entirely as to make the person who erected it a trespasser, for entering and removing it after the revocation. In some cases, the motive will excuse the entry. If J. S. go into the close of J. N. to succor the beast of J. N., the life of which is in danger, an action of trespass will not lie; because, as the loss of J. N., if the beast had died, would have been irremediable, the doing of this is lawful. But if J. S. go into the close of J. N. to prevent the beast of J. N. from being stolen, or to prevent his corn from being consumed by hogs, or spoiled, the action of trespass lies; for the loss, if either of those things had happened, would not have been irremediable. Bac. Abr. Trespass F. And if a stranger chase the beast of A. which is damage feasant therein, out of the close of B., trespass will lie; for by doing this, although it seem to be for his benefit, B is deprived of his right to distrain the beast. Bro. Tresp. pl. 421. Keilw. 46, 13.

In some cases the entry will be excused by necessity. As if a public highway is impassable, a traveler may go over the adjoining land. 2 Show. 28. Lev. 234. 1 Ld. Raym. 725. But this would not extend to a private way; for it is the owner's fault if he do not keep it in repair. Doug. 747. 1 Saund. 321. So if a man who is assaulted, and in danger of his life, run through the close of another, trespass will not lie, because it is necessary for the preservation of his life. Year-Book, 37 H. 6, 37, pl. 26. If my tree be blown down and fall on the land of my neighbor, I may go on and take it away. Bro. Tres. pl. 213. And the same rule prevails where fruit falls on the land of another. *Miller v. Fawdry*, Latch, 120. But if the owner of a tree cut the loppings so that they fall on another's land, he cannot be excused for entering to take them away, on the ground of necessity, because he might have prevented it. Bac. Abr. Trespass F.

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But it is well settled that where there is neither an express nor an implied license, nor any such legal excuse as is above stated, a man has no right to enter upon the land of another for the purpose of taking away a chattel being there, which belongs to the former. The mere fact that the plaintiff owns the chattel, gives him no authority to go upon the land of another to get it. In *Heermance v. Vernoy*, 6 John. Rep. 5, where A. had entered upon the land of B. without his permission, to take a chattel belonging to A.; it was held to be a trespass. So in *Blake v. Jerome*, 14 John. 406, a mare and colt were taken out of the plaintiff's field by a person who acted under the orders and direction of the defendant after they had been demanded by the defendant and refused to be delivered to him; and after he had been expressly forbidden to take them; and the defendant was held to be guilty of a trespass.

In this case, the plaintiff's horses and wagon were on the lands of the defendant, where they had been left by the servant of the plaintiff. They were not there by the defendant's permission. On the contrary, the plaintiff had been guilty of a trespass in sending his team across the lands of the defendant, after he had been forbidden to do so. And I think the defendant had the right to detain them, before they left the premises, and to distrain them damage feasant. 2 Rev. Stat. 427. But it is not necessary to decide, whether the defendant detained the property rightfully or wrongfully.

The plaintiff attempted to enter upon the lands of the defendant and against his will, for the purpose of taking away his property. This he had no right to do, even though his property were unlawfully detained there. If the plaintiff could not regain the possession of his property peaceably, he should have resorted to his legal remedy, by which he could, after demand and refusal, have recovered either the property itself or its value. He had no right to redress himself by

force. 1 Black. Com. 4. In pursuing his object, the plaintiff tore down the defendant's fence after he had been forbidden to enter, and after he had been ordered by the defendant to desist. The defendant had a right to protect himself in the enjoyment of his possession and his property, by defending them against such aggression. 8 T. R. 88, 299. 1 Saund. 296, note 1. 1 Salk. 641. 1 Bing. 158. 3 Black. Com. 5.

The defendant cannot be held liable for the injuries inflicted upon the plaintiff, on the occasion in question, unless he used more force than was necessary for the defence of his possession; and it seems he did not use enough to prevent the plaintiff's effecting his forcible entry and taking away the property. But that was a question proper to be submitted to the jury.

The judgment of the circuit court must be reversed, and a new trial awarded; costs to abide the event.

Reversed.

MCLEOD v. JONES.

Supreme Court of Massachusetts, October, 1870. 105 Mass. 403.

TORT for forcibly entering the plaintiff's close in Taunton, and removing and converting to the defendant's use household furniture found therein.

At the trial in the superior court, before Pitman, J., property in and possession of the close (which was the upper story of a house) by the plaintiff were admitted; and the plaintiff introduced evidence to show that he had hired and occupied the premises as a residence and dwelling for himself and his wife and two children, about two years, when in September, 1868, he took them on a visit to Fall River, and he himself went to New York on a visit to his father; that he intended to return to Taunton in about four weeks, but for various reasons changed his original design and ceased to reside in Taunton; that three or four days after he went away, "leaving his furniture and household goods in the same state, as he used them for house-keeping purposes, and the doors of his tenement locked," the defendant went to the house with a key that would fit the door, unlocked and entered the tenement, and took and carried away the furniture.

It appeared "that the plaintiff, while living in Providence, had given to the defendant a bill of sale of a part or the whole of the articles of furniture, and had subsequently brought them with him to Taunton; and that the plaintiff had formerly given to the defendant a mortgage of certain goods owned and used by the plaintiff in his shop, some of which goods the plaintiff testified that he subsequently carried to his house, and were among the goods taken by the defendant."

The defendant claimed all the articles taken by him, under the bill of sale and mortgage, and contended that, from the circumstances proved, he had a right to believe that at the time of the entry the plaintiff did not intend to return to Taunton; and he asked the judge to rule that "if the plaintiff had left the city with his family, leaving household furniture, the defendant's property, in his last place of residence in the city, a hired tenement, and the defendant, having reasonable cause to believe, and believing, that the plaintiff and family did not intend to return, entered said residence in a quiet and peaceable manner and took away his goods, causing no other disturbance than was necessary in order to get the same, he would not be liable in this action." The judge refused so to rule; and ruled that "if the defendant entered the plaintiff's dwelling-house in the manner shown by the plaintiff's evidence above reported, and carried away the goods as shown by the plaintiff's evidence, he would be liable in this action for a forcible entry, although he went there to get his own property; and that the defendant would have no right to enter the same in such a manner, and for such a purpose, without some license or permission from the plaintiff, express or implied, other than the mere fact that his goods were in said premises under the circumstances before stated." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

WELLS, J. The defendant was liable as a trespasser for entering the plaintiff's close, unless he can justify his entry by some legal right, or by some license or permission so to do. The plaintiff's absence will not excuse him. Reasonable cause to believe, and actual belief that the plaintiff and his family did not intend to return, are no defence. The only question is, whether the ruling of the court below was correct, that "the mere fact that his goods were in said premises under the circumstances stated" did not furnish a sufficient ground from which a license, permission or legal right could be inferred.

In the decision of this question, we must assume that the defendant's claim would have been sustained, that his title, as mortgagee of all property taken away by him, was valid, and his mortgage debt unpaid. He had a right then to the possession of the property which he took.

But the possession of the plaintiff, as mortgagor, was not wrongful. The goods were rightfully upon his premises. There is nothing to show that the terms of the mortgage, or bill of sale, under which the defendant claimed them, gave him any special authority to enter for the purpose of recovering the property, in any event; nor that the removal of the goods from the shop to the house, or from Providence to Taunton, was inconsistent with the rights of the mortgagee, or against his wishes. The removal from Providence was about two years before the time of this entry.

The goods then were rightfully in the custody of the plaintiff, and within his close. The defendant was the owner of the legal title, with a present right of possession. Does that alone justify him in a breach of the plaintiff's close? A majority of the court are of opinion that it does not.

One whose goods are stolen, or otherwise illegally taken from him, may pursue and retake them wherever they may be found. No one can deprive him of this right, by wrongfully placing them upon his own close. *Patrick v. Colerick*, 3 M. & W. 483. *Webb v. Beavan*, 6 M. & G. 1055, and note. Com. Dig. Trespass D, citing 2 Rol. Ab. 565, l. 54. Bac. Ab. Trespass, F, 1. But if they are deposited upon the land of another, who is not a participant in the wrongful taking, the owner cannot enter upon his land to retake them; unless in case of theft, and fresh pursuit. 20 Vin. Ab. 506, Trespass H, a. 2, pl. 4, 5. So, from the necessity of the case, one whose cattle escape upon the land of another may follow and drive them back, without being a trespasser, unless the escape itself was a trespass. Com. Dig. Trespass D, citing 2 Rol. Ab. 565, l. 35.

In these cases, the law gives the party a right to enter for that particular purpose.

In other cases a right or license to enter upon land results, or may be inferred, from the contracts of the parties in relation to personalty. Permission to keep, or the right to have one's personal property upon the land of another, involves the right to enter for its removal. *Doty v. Gorham*, 5 Pick. 487. Bac. Ab. Trespass F, 1. *White v. Elwell*, 48 Maine, 360.

A sale of chattels, which are at the time upon the land of the seller, will authorize an entry upon the land to remove them, if, by the express or implied terms of the sale, that is the place where the purchaser is to take them. *Wood v. Manley*, 11 Ad. & El. 34. *Nettleton v. Sikes*, 8 Met. 34. *Giles v. Simonds*, 15 Gray, 441. *Drake v. Wells*, 11 Allen, 141. *McNeal v. Emerson*, 15 Gray, 384.

A license is implied, because it is necessary in order to carry the sale into complete effect; and is therefore presumed to have been in contemplation of the parties. It forms a part of the contract of sale. The seller cannot deprive the purchaser of his property, or drive him to an action for its recovery, by withdrawing his implied permission to come and take it. This proposition does not apply, of course, to a case where a severance from the realty is necessary to convert the subject of the sale into personalty, and the revocation is made before such severance.

But there is no such inference to be drawn, when the property, at the time of sale, is not upon the seller's premises; or when, by the terms of the contract, it is to be delivered elsewhere. And when there is nothing executory or incomplete between the parties in respect to the property, and there is no relation of contract between them af-

fecting it, except what results from the facts of ownership or legal title in one, and possession in the other, no inference of a license to enter upon lands for the recovery of the property can be drawn from that relation alone. 20 Vin. Ab. 508, Trespass H, a. 2, pl. 18. *Anthony v. Haney*, 8 Bing. 186. *Williams v. Morris*, 8 M. & W. 488.

We think the authorities cited illustrate and establish these distinctions.

It is said in Com. Dig. Trespass D, citing 2 Rol. Ab. 566, l. 30, that I may not enter lands "for retaking goods, which he, who holds them in common with me, put there; for though a tenant in common may retake goods in common, when the other takes them, yet he cannot justify a trespass to do it."

In *Wood v. Manley*, 11 Ad. & El. 34, where the doctrine that a sale of goods, to be taken on the premises of the seller, gives a license to the purchaser to enter and take them, is laid down, it is guarded by the remark of Patteson, J., "I do not say that a mere purchase will give a license."

In Bac. Ab. Trespass F, 1, it is said: "But if J. S. have commanded to A. to deliver a beast to J. N. and J. N. go into the close of J. S. to receive the beast, the action does lie; for, as the beast might have been delivered at the gate of the close, the going of J. N. thereinto is not necessary."

In the note to *Webb v. Beavan*, 6 M. & G. 1055, is a citation from the year books, 9 Edw. IV. 35, in which Littleton, J., after laying down the doctrine that a man may enter the close of another to retake his own goods wrongfully put there, is reported to have said: "But it is otherwise if I bail goods to a man. I cannot enter his house and take the goods, for they did not come there by wrong, but by the act of us both."

It is by the act of both, that goods, upon which the defendant had only a chattel mortgage, leaving the possession rightfully with the plaintiff, were in the plaintiff's house. In 20 Vin. Ab. 507, Trespass H, a. 2, pl. 12, it is said: "If a man takes my goods and puts them upon his land, I may enter and retake them. Contrary upon bailment of goods," citing the above authority of Littleton. A note contains the following: "When a man bails goods to another to keep, it is not lawful for him, though the doors are open, to enter into the house of the bailee and to take the goods, but ought to demand them; and if they are denied, to bring writ of detinue, and to obtain them by law," citing Bro. Ab. Trespass, pl. 208, and 21 Hen. VII. 13. A right to enter the premises of the mortgagor, without legal process, is not essential to the security of the mortgagee of personal property. Permission to do so is not implied, therefore, from the existence of that relation alone. If there was anything in the form of the mortgage or bill of sale, or in the nature and circumstances of the plaintiff's possession of the property, which gave the defendant a right to

seek it within the close of the plaintiff, where it had been deposited since the date of the mortgage or bill of sale, it should have been made to appear. The burden was upon the defendant to establish the special right which he set up in justification of his entry. At the trial, he based his right to enter, solely upon his title to the personal property, and the supposed abandonment of the premises by the plaintiff; and asked the court to rule that that was sufficient. The court held it to be insufficient "without some license or permission from the plaintiff, express or implied." The defendant does not show that there was anything in the terms of his bill of sale or mortgage, or in the situation of the property at the time it was made, or in the circumstances of the plaintiff's possession at the time of the entry, from which such license or permission would be implied; and he asked no instructions upon the evidence, upon that point, if any existed at the trial.

In *McNeal v. Emerson*, 15 Gray, 384, the property mortgaged was furniture, which remained in the same situation as when the mortgage was made, and the circumstances left the case in the same position substantially as a sale of personal property to be removed by the purchaser.

In the case of *Heath v. Randall*, 4 Cush. 195, the jury must have found, under the instructions given them, that the contract was that the defendant had a right to take the property away any day until paid for; which was plainly understood to mean a right to take it from the premises of the bailee. It is to be observed also, that in that case the question pressed in the argument, and to which the discussion by the court was mainly directed, was that of the right to terminate the bailment without demand of the balance due upon the conditional purchase; the right of entry upon the plaintiff's close being considered only incidentally.

A majority of the court are of opinion that the facts reported in this case are not sufficient to sustain the justification relied on by the defendant, and that the instructions upon that point were correct. If the defendant established his title to the property taken away, he would of course be liable only for such injury as he did to the plaintiff's house. But no question appears to be raised as to the measures of damages, and we are to presume that proper instructions upon that point were given.

Exceptions overruled.

MALCOLM v. SPOOR.

Supreme Court of Massachusetts, March, 1847. 12 Met. 279.

THE case is stated in the opinion of the court.

SHAW, C. J. This was an action of trespass, in which the plain-

tiff declared against the defendant for breaking and entering her house, &c. The defendant justified under a writ directed to him, as constable, and commanding him to attach the plaintiff's household furniture.

The case comes before us on exceptions, from which it appears that the defendant was a constable, and that he entered the plaintiff's house, having a writ against her, and attached her furniture; that he took with him into the house a man who was intoxicated, whom he made keeper of the attached furniture, and left in the house in charge of the furniture, although the plaintiff objected to his remaining there as keeper, on account of his intoxication.

The exceptions also set forth the violent conduct of the keeper, and other matters, which are not material to the decision of the question that is brought before us.

The Court of Common Pleas, in which the trial was had, instructed the jury that if the defendant, under color of his process, took with him a grossly intoxicated and clearly unfit person into the plaintiff's house, and left him therein as keeper, this was such an abuse of his authority as made him a trespasser *ab initio*; and that the defendant was answerable for all the acts of such keeper, done in pursuance of previous concert between them, or by direction of the defendant. A verdict was returned for the plaintiff; and the question whether these instructions were right has been submitted to us without argument.

It has been held as a rule of the common law, ever since the Six Carpenters' Case, 8 Co. 146, that where one is acting under an authority conferred by law, an abuse of his authority renders him a trespasser *ab initio*. *Melville v. Brown*, 15 Mass. 82. In the case before us, the defendant had authority by law to enter the plaintiff's house, to serve legal process; but placing there an unfit and unsuitable person, to keep possession of the attached goods in his behalf, until he could remove them, against the remonstrance of the plaintiff, was an abuse of his authority, which rendered him liable as a trespasser *ab initio*.

An officer cannot legally stay in another's building, to keep attached goods therein, nor authorize any other person to remain therein, as keeper, for a longer time than is reasonably necessary to enable him to remove the goods, unless he has the consent, express or implied, of the owner of the building, without rendering himself liable as a trespasser. See *Rowley v. Rice*, 11 Met. 337.

Exceptions overruled.

ADAMS v. RIVERS.

Supreme Court of New York, July. 1851. 11 Barbour. 390.

ACTION for trespass, brought in a justice's court. The plaintiff proved that he was in possession of premises bounded on a public street, and that he owned to the middle thereof, subject to an easement in the public; that the defendant came upon the sidewalk in front of the plaintiff's premises, and remained there a considerable time, using vile and abusive language toward the plaintiff.

The plaintiff also proved that he was in possession of other premises, with buildings thereon, and that the defendant came upon the piazza of the plaintiff's house, and used insulting language toward the plaintiff. The defendant moved for a nonsuit, upon the ground (among others) that the locus in quo was a public street, and the plaintiff had not proved any damages. The defendant also moved to strike out the testimony of the conversation and acts done by the defendant in the highways, which motion was denied. There was a verdict for the plaintiff, and the defendant appealed to the county court, which court reversed the judgment. One ground of reversal was, that the evidence of the language and conversation of the defendant on the sidewalk of public streets was improperly admitted.

Thereupon, the plaintiff brought this appeal to the Supreme Court.

WILLARD, P. J. . . . The plaintiff proved, *prima facie*, that he owned and possessed both the lots mentioned in the complaint. These lots being bounded by public streets, extended to the centre of the street. This is undoubtedly the legal presumption. In *Adams v. The Saratoga and Washington Railroad Co.* just decided by this court, 11 Barb. 414, all the leading cases are collected. 2 Kent's Com. 433. 2 Johns. 363. 1 Wend. 270. 2 Id. 473. 8 Id. 106. 11 Id. 486. 4 Paige, 513. 12 Wend. 98. 15 John. 447. 2 Smith's Leading Cases by Hare and Wallace, 173, and note. 2 Str. 1004. I shall assume that to be the law, without a more extended review of the cases. As was well remarked by Justice Cowen in *Pearsall v. Post*, 20 Wend. 121, the relative rights both of owner and passenger in a highway, are well understood and familiarly dealt with by the law. Subject to the right of mere passage, the owner of the soil is still absolute master. The horseman cannot stop to graze his steed, without being a trespasser; it is only in case of inevitable, or at least accidental detention, that he can be excused even in halting for a moment.

This brings us to the main question in the case, whether the defendant by using abusive and insulting language to the plaintiff, became a trespasser from the beginning. The testimony authorized the jury to find that the defendant came on to the premises of the plaintiff, covered by the street, not in the legitimate use of the high-

way as a place of travel, but for the express purpose of abusing him. The opprobrious language used by the defendant was not actionable as slanderous. It was highly provoking and tended directly to a breach of the peace. It was received in evidence merely to show that the defendant was a trespasser, having forfeited his privilege by a gross abuse of it; and not indirectly to recover damages before the justice, for actionable words. It is conceded that the justice had no jurisdiction of an action of slander.

The general doctrine as laid down in *The Six Carpenters' Case*, 8 Co. 146, a, is that when an entry, authority or license is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*; but when an entry, authority or license is given by the party, and he abuses it, then he must be punished for the abuse, but shall not be a trespasser *ab initio*. In accordance with this distinction, it is held that if a man enter an inn or tavern, and subsequently commits a trespass; if the lord who distrains for rent, or the owner for damage feasant, works or kills the distress; or if he who enters to see waste, breaks the house, or stays there all night; or if the commoner cuts down a tree, in these and the like cases the law adjudges that he entered for that purpose; and because the *act which demonstrates it is a trespass*, he shall be a trespasser *ab initio*. *Six Carpenters' Case*, *supra*.

In all the cases put by Coke, the acts complained of as abuses of the power, were distinct acts of trespass. And it seems to be the better opinion that a man cannot become a trespasser *ab initio*, by any act or omission, which would not itself, if not protected by a license, be the subject of trespass. Thus in *Shorland v. Govett*, 5 B. & C. 485, the sheriff's officer justified a trespass under a *fi. fa.*, and it was held that a demand by the officer of more than was due by the warrant, did not make him a trespasser from the beginning. The reason is, that the original levy was lawful, and extortion is not an act for which trespass will lie. In *Gates v. Lounsbury*, 20 John. 429, Spencer, Ch. J., says, that where an act is badly done, it cannot be made illegal *ab initio*, unless by some positive act incompatible with the exercise of the legal right to do the first act. And the same learned judge in *Gardiner v. Campbell*, 15 John. 402, recognizes the distinction in *The Six Carpenters' Case*, between the *actual* and *positive* abuse of a thing, taken originally by authority of the law, and a mere *nonfeasance*, such as a refusal to deliver an article distrained. And Bronson, J., affirms the same principle in *Hale v. Clark*, 19 Wend. 498, that a mere nonfeasance will never make a man a trespasser from the beginning; some act is required to be shown. The same doctrine is recognized by elementary writers. 2 Leigh's N. P. 1445. 2 Phil. Ev. 197, 198. 1 Smith's Leading Cases, by Hare and Wallace, 165, 166.

The case of *Adams v. Adams*, 13 Pick. 384, establishes the doctrine

that the *omission* of a distrainer to afford proper food and water to distrained cattle, made the distrainer a trespasser from the beginning. And in *Bond v. Wilder*, 16 Verm. R. 399, the *neglect* of an officer to sell goods advertised under an execution, in pursuance of his advertisement, was held to work the same consequence. Both these cases are believed to be a departure from the English law, and they certainly are not in harmony with the New York cases.

Savage, Ch. J., in *Allen v. Crofoot*, 5 Wend. 509, does not admire the distinction taken by Coke between the abuse of a license granted by law, and a license granted by the party. And he thinks a better reason was given for it in Bacon's Abridgment, title Trespass B. Where the law has given an authority, it is reasonable that it should make void every thing done by the abuse of authority, and leave the abuser as if he had done everything without authority. But where a man, who was under no necessity to give an authority, does so, and the person receiving the authority abuses it, there is no reason why the law should interfere to make void everything done by such abuse; because it was a man's folly to trust another with an authority who was not fit to be trusted therewith.

No case has been cited showing that a man will forfeit a license granted by law, by the use of vituperative language; and none such have fallen under my notice. In all the cases, except *Adams v. Adams* and *Bond v. Wilder*, some positive act, such as if done without authority would be a trespass, has been held essential to make the party a trespasser ab initio. These cases may have been decided upon local statutes.

It is quite clear that the uttering abusive language was not an act for which the plaintiff could maintain trespass against the defendant. Had such language been uttered in an inn by a guest to the landlord, it would have afforded just cause for the latter to expel the former. So doubtless in *The Six Carpenters' Case*, their refusal to pay for their room, though it did not make their original entry unlawful, would have justified the landlord in ordering them to depart. Story on Bail. 484.

The right of an innkeeper to refuse to receive a guest, or to order him to depart, rests on reasons peculiar to that relation. *Id.* 484. An innkeeper is bound to receive all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received. 3 Barn. & Ald. 283.

"A highway," says Swift, justice, in *Peck v. Smith*, 1 Conn. Rep. 132, "is nothing but an easement, comprehending merely the right of all the individuals in the community to pass and repass, with the incidental right in the public to do all the acts necessary to keep it in repair. This easement does not comprehend any interest in the soil, nor give the public the legal possession of it." In this state, since

the adoption of the revised statutes, the public, under certain circumstances, may have a qualified right of pasturage, by certain animals, at certain seasons. *Griffin v. Martin*, 7 Barb. 297. The use of the highway, by any person for any purpose other than to pass and repass, is a trespass upon the person who owns the fee of the road. 1 New Hamp. Rep. 16. *Babcock v. Lamb*, 1 Cowen, 238. *Jackson v. Hathaway*, 15 John. 447. But no act will amount to a trespass unless the same act would be a trespass if committed on any other land of the plaintiff. Language, however licentious and abusive, is not a trespass, within the appropriate meaning of that term. Nor can a party be made a trespasser upon the freehold of the adjoining owners of the soil, by the uttering of abusive language as he passes along the road. A person who disturbs the public peace as he passes along the road, by singing obscene songs and using boisterous and obscene language, may be liable to be punished at the suit of the public, for a breach of the peace, but he is not liable in trespass at the suit of the adjoining owners. These acts, however censurable, are not acts of *trespass*.

The foregoing remarks show that if the action was sought to be maintained on the ground that the defendant became, while passing on the road, a trespasser from the beginning, by reason of his abusive language to the plaintiff, the action cannot be maintained. The county judge must have taken this view of the case: for one of the reasons for the reversal is that evidence was received by the justice, under objections, of the language and conversation of the defendant on the side walks of public streets, and in his judgment no action could be maintained for that cause. It is presumed that the county judge supposed that the abusive language was proved, not as a substantive cause of action, but as showing that the defendant had forfeited his right to be in the highway on the plaintiff's premises; in short that he was a trespasser *ab initio*, by reason of his abusive conduct. . . .

[The court held, however, that the judgment of the county court should be reversed and that of the justice affirmed, upon other grounds, one of which was that a distinct trespass was shown in the defendant's coming upon the plaintiff's piazza.]

Judgment reversed.

CHAPTER XIV.

CONVERSION.

FOULDES *v.* WILLOUGHBY.

Court of Exchequer of England, June, 1841. 8 M. & W. 540.

TROVER for divers, to wit, two horses. Plea: Not guilty. The cause was tried before Maule, J., at the last spring assizes for Liverpool, when it appeared that the defendant was the occupier or manager of a ferry by means of steamboats over the river Mersey, from Birkenhead to Liverpool, and that on the 15th of October, 1840, the plaintiff had embarked on board the defendant's ferry-boat at Birkenhead, having with him two horses, for the carriage of which he had paid the usual fare. It was alleged that the plaintiff misconducted himself and behaved improperly after he came on board the steamboat, and when the defendant came on board he told the plaintiff that he would not carry the horses over, and that he must take them on shore. The plaintiff refused to do so, and the defendant took the horses from the plaintiff, who was holding one of them by the bridle, and put them on shore on the landing slip. They were driven to the top of the slip, which was separated by gates from the high road, and turned loose on the road. They were shortly afterwards seen in the stables of a hotel at Birkenhead, kept by the defendant's brother. The plaintiff remained on board the steamboat, and was conveyed over the river to Liverpool. On the following day the plaintiff sent to the hotel for the horses, but the parties in whose possession they were refused to deliver them up. A message, however, was afterwards sent to him by the hotel-keeper, to the effect that he might have the horses on sending for them and paying for their keep; and that if he did not send for them and pay for their keep, they would be sold to pay the expense of it. The plaintiff then brought the present action. The horses were subsequently sold by auction. The defence set up at the trial was, that the plaintiff had misconducted himself and behaved improperly on board, and that the horses were sent on shore in order to get rid of the plaintiff, by inducing him to follow them. The learned judge told the jury that the defendant, by taking the horses from the plaintiff and turning them out of the vessel, had been guilty of a conversion, unless they thought the plaintiff's conduct had justified his removal from the steamboat, and he had refused to go without his horses; and that if they thought the conversion was proved, they

might give the plaintiff damages for the full value of the horses. The jury found a verdict for the plaintiff with £40 damages, the value of the horses.

In Easter term last, a rule was obtained calling upon the plaintiff to show cause why the verdict should not be set aside on the ground of misdirection, both as to the proof of a conversion, and also as to the amount of the damages.

LORD ABINGER, C. B. This is a motion to set aside the verdict on the ground of an alleged misdirection; and I cannot help thinking that if the learned judge who tried the cause had referred to the long and frequent distinctions which have been taken between such a simple asportation as will support an action of trespass, and those circumstances which are requisite to establish a conversion, he would not have so directed the jury. It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. I had thought that the matter had been fully discussed, and this distinction established, by the numerous cases which have occurred on this subject; but, according to the argument put forward by the plaintiff's counsel to-day, a bare asportavit is a sufficient foundation to support an action of trover. I entirely dissent from this argument; and therefore I think that the learned judge was wrong, in telling the jury that the simple fact of putting these horses on shore by the defendant, amounted to a conversion of them to his own use. In my opinion, he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. If the object, and whether rightly or wrongfully entertained is immaterial, simply was to induce the plaintiff to go on shore himself, and the defendant, in furtherance of that object, did the act in question, it was not exercising over the horses any right inconsistent with, or adverse to, the rights which the plaintiff had in them. Suppose, instead of the horses, the defendant had put the plaintiff himself on shore, and, on being put on shore, the plaintiff had refused to take his horses with him, and the defendant had said he would take them to the other side of the water, and had done so, would that be a conversion? That would be a much more colorable case of a conversion than the present, because, by separating the man from his property, it might, with some appearance of fairness, be said the party was carrying away the horses without any justifiable reason for so doing. Then, having conveyed them across the water, and finding neither the owner or any one else to receive them, what is he to do with them? Suppose, under those circumstances, the defendant lands them, and leaves them on shore, would that amount to a conversion? The argument of the plaintiff's counsel in this case must go the length of saying that it would. Then, suppose the reply to be that

those circumstances would amount to a conversion, I ask, at what period of time did the conversion take place? Suppose the plaintiff had immediately followed his horses when they were put on shore, and resumed possession of them, would there be a conversion of them in that case? I apprehend, clearly not. It has been argued that the mere touching and taking them by the bridle would constitute a conversion, but surely that cannot be; if the plaintiff had immediately gone on shore and taken possession of them, there could be no conversion. Then the question, whether this were a conversion or not, cannot depend on the subsequent conduct of the plaintiff in following the horses on shore. Would any man say, that if the facts of this case were, that the plaintiff and defendant had had a controversy as to whether the horses should remain in the boat, and the defendant had said, "If you will not put them on shore, I will do it for you," and, in pursuance of that threat, he had taken hold of one of the horses to go ashore with it, an action of trover could be sustained against him? There might, perhaps, in such a case, be ground for maintaining an action of trespass, because the defendant may have had no right to meddle with the horses at all; but it is clear that he did not do so for the purpose of taking them away from the plaintiff, or of exercising any right over them, either for himself or for any other person. The case which has been cited from *Strange's Reports*, of *Bushell v. Miller*, seems fully in point. There the plaintiff and defendant, who were porters, had each a stand on the Custom-House Quay. The plaintiff placed goods belonging to a third party in such a manner that the defendant could not get to his chest without removing them, which he accordingly did, and forgot to replace them, and the goods were subsequently lost. Now suppose trespass to have been brought for that asportation, the defendant, in order to justify the trespass, would plead that he removed the parcels, as he lawfully might, for the purpose of coming at his own goods; and the court there said that, whatever ground there might be for an action of trespass in not putting the package back in its original place, there was none for trover, inasmuch as the object of the party in removing it was one wholly collateral to any use of the property, and not at all to disturb the plaintiff's rights in or dominion over it. Again, suppose a man puts goods on board of a boat, which the master thinks are too heavy for it, and refuses to carry them, on the ground that it might be dangerous to his vessel to do so, and the owner of the goods says, "If you put my goods on shore, I will go with them," and he does so; would that amount to a conversion in the master of the vessel, even assuming his judgment as to the weight of the goods to be quite erroneous, and that there really would be no danger whatever in taking them? In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, by himself or by those for whom he acts, or that, owing

to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner. As an instance of the latter branch of this definition, suppose, in the present case, the defendant had thrown the horses into the water, whereby they were drowned, that would have amounted to an actual conversion; or as in the case cited in the course of the argument, of a person throwing a piece of paper into the water; for, in these cases, the chattel is changed in quality, or destroyed altogether. But it has never yet been held that the single act of removal of a chattel, independent of any claim over it, either in favor of the party himself or any one else, amounts to a conversion of the chattel. In the present case, therefore, the simple removal of these horses by the defendant, for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the possession and enjoyment of them, is no conversion of the horses, and consequently the rule for a new trial ought to be made absolute.

With respect to the amount of damage, it was altogether a question for the jury. I am not at all prepared to say, that if the jury were satisfied that there had been a conversion in this case, they would be doing wrong in giving damages to the full value of the horses. I do not at all rest my judgment on that point, but put it aside entirely. If the judge had told the jury that there was evidence in the case from whence they might infer that a conversion of these horses had taken place at some time, it would have been different; but his telling them that the simple act of putting them on shore amounted to a conversion, I think, was a misdirection, on which the defendant is entitled to a new trial.

ALDERSON, B. I am of the same opinion. As to the last point, it would be a strange thing to disturb the verdict on the ground that the jury had given as damages the full value of these horses; for it appears that they were ultimately sold, and the plaintiff never regained possession of them. If, therefore, the original act of taking the horse really amounted to a conversion of them, it would be a strong proposition for us to say, that the plaintiff was not entitled to recover their full value, as damages for the wrongful act done. But the mere circumstance which the learned judge in this case put to the jury, as constituting the conversion, does not necessarily amount to one. Any asportation of a chattel for the use of the defendant, or a third person, amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion. So, if a man has possession of my chattel, and refuses to deliver it up, this is an assertion of a right inconsistent with my general dominion over it, and the use which at all times, and in all places, I am entitled to make of it; and consequently

amounts to an act of conversion. So the destruction of the chattel is an act of conversion, for its effect is to deprive me of it altogether. But the question here is, where a man does an act, the effect of which is not for a moment to interfere with my dominion over the chattel, but, on the contrary, recognizing throughout my title to it, can such an act as that be said to amount to a conversion? I think it cannot. Why did this defendant turn the horses out of his boat? Because he recognized them as the property of the plaintiff. He may have been a wrong-doer in putting them ashore; but how is that inconsistent with the general right which the plaintiff has to the use of the horses? It clearly is not; it is a wrongful act done, but only like any common act of trespass to goods with which the party has no right to meddle. Scratching the panel of a carriage would be a trespass; but it would be a monstrous thing to say that it would be a ground for an action of trover; and yet to that extent must the plaintiff's counsel go if their argument in this case be sound. But such is not the law; and the true principle is that stated by Chambre and Holroyd, JJ., when at the bar, in their argument in the case of *Shipwick v. Blanchard*, 6 T. R. 299 that "In order to maintain trover the goods must be taken or detained, with intent to convert them to the taker's own use, or to the use of those for whom he is acting." This definition, indeed, requires an addition to be made to it, namely, that the destruction of the goods will also amount to a conversion. For these reasons, I think, in the case before us, the question ought to have been left to the jury to say, whether the act done by the defendant, of seizing these horses and putting them on shore, was done with the intention of converting them to his own use, i. e., with the intention of impugning, even for a moment, the plaintiff's general right of dominion over them. If so, it would be a conversion; otherwise not.

ROLFE and GURNEY, BB., delivered concurring opinions.

Rule absolute.

SPOONER v. MANCHESTER.

Supreme Court of Massachusetts, September, 1882. 133 Mass. 270.

AT the trial in the Superior Court, before Dewey, J., without a jury, it appeared that, on a Sunday in January, 1879, the defendant hired a horse of the plaintiff at Worcester to go to Clinton, a town situated twelve miles northerly from Worcester, and return on the evening of the same day; that the defendant drove the horse to Clinton over the road usually travelled between Worcester and Clinton; that he had never been over that road before; that he started with the horse to return from Clinton to Worcester over the same road about nine o'clock in the evening; that, after he had travelled

a short distance from Clinton, he unintentionally took the usually travelled road from Clinton to Northborough, a town about ten miles southeasterly from Clinton and about ten miles easterly from Worcester, and not the direct road from Clinton to Worcester, and not on the road usually travelled between those places; that after proceeding five or six miles on said road from Clinton to Northborough beyond where said road diverged from the road to Worcester, he discovered that he was on the wrong road, although he had gone but a mile or two from Clinton before he first thought he was not on the road to Worcester; that, upon discovering that fact, he drove back on said road a short distance, and was informed that it would be the best way from that point to go through Northborough to Worcester; that he then turned round and started towards Worcester through Northborough; and that, when passing round a corner in Northborough, the horse became lame and disabled.

It did not appear that said injury was caused to the horse by any want of due care in the manner he was managing the same at the time of the injury, or that the defendant was not in the exercise of ordinary care when he lost his way.

Upon these facts, the plaintiff contended that he was entitled to recover for said injury to the horse; and the defendant asked the judge to rule that he was not liable for said injury.

The judge ruled the defendant was liable for said injury, and found for the plaintiff; and the defendant alleged exceptions.

FIELD, J. This case apparently falls within the decision in *Hall v. Corcoran*, 107 Mass. 251, except that this defendant unintentionally took the wrong road on his return from Clinton to Worcester, and when, after travelling on it five or six miles, he discovered his mistake, he intentionally took what he considered the best way back to Worcester, which was by circuit through Northborough.

The case has been argued as if it were an action of tort in the nature of trover, and, although the declaration is not strictly in the proper form for such an action, both parties desire that it should be treated as if it were, and we shall so consider it.

As the horse was hired and used on Sunday, and it does not appear that this was done from necessity or charity, and also as it does not appear that the horse was injured in consequence of any want of due care on the part of the defendant, or that the defendant was not in the exercise of ordinary care when he lost his way, the question whether the acts of the defendant amounted to a conversion of the horse to his own use is vital. The distinction between acts of trespass, acts of misfeasance and acts of conversion is often a substantial one. In actions in the nature of trespass or case for misfeasance, the plaintiff recovers only the damages which he has suffered by reason of the wrongful acts of the defendant; but, in actions in the nature of trover, the general rule of damages is the value of the property at

the time of the conversion, diminished when, as in this case, the property has been returned to and received by the owner, by the value of the property at the time it was returned, so that after the conversion and until the delivery to the owner the property is absolutely at the risk of the person who has converted it, and he is liable to pay for any depreciation in value, whether that depreciation has been occasioned by his negligence or fault, or by the negligence or fault of any other person, or by inevitable accident or the act of God. *Perham v. Coney*, 117 Mass. 102.

The satisfaction by the defendant of a judgment obtained for the full value of the property vests the title to the property in him, by relation, as of the time of the conversion. Conversion is based upon the idea of an assumption by the defendant of a right of property or a right of dominion over the thing converted, which casts upon him all the risks of an owner, and it is therefore not every wrongful intermeddling with, or wrongful asportation or wrongful detention of, personal property, that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts which do not in themselves imply an assertion of title, or of a right of dominion over such property, will not sustain an action of trover, unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant in withholding it claims the right to withhold it, which is a claim of a right of dominion over it.

In *Spooner v. Holmes*, 102 Mass. 503, Mr. Justice Gray says that the action of trover "cannot be maintained without proof that the defendant either did some positive wrongful act with the intention to appropriate the property to himself or to deprive the rightful owner of it, or destroyed the property," and the authorities are there cited. *Fouldes v. Willoughby*, 8 M. & W. 540,¹ is a leading case, establishing the necessity, in order to constitute a conversion, of proving an intention to exercise some right or control over the property inconsistent with the right of the lawful owner, when the act done is equivocal in its nature. See also *Simmons v. Lillystone*, 8 Exch. 431; *Wilson v. McLaughlin*, 107 Mass. 587.

It is argued that the act of the defendant in this case was a user of the horse for his own benefit, inconsistent with the terms of the bailment, and that the defendant's mistake in taking the wrong road was immaterial, and these cases are cited; *Wheelock v. Wheelwright*, 5 Mass. 104. *Homer v. Thwing*, 3 Pick. 492. *Lucas v. Trumbull*, 15 Gray, 306. *Hall v. Corcoran*, *ubi supra*. In each of these cases,

¹ *Ante*, p. 504.

there was an intentional act of dominion exercised over the horse hired, inconsistent with the right of the owner.¹

In *Wellington v. Wentworth*, 8 Met. 548, a cow, going at large in the highway without a keeper, joined a drove of cattle, in May or June, 1842, without the knowledge of the owner of the drove, and was driven into New Hampshire and pastured there, during the season, with the defendant's cattle, and in the autumn returned with the drove and was delivered to the plaintiff; and it was held that there was no conversion. Chief Justice Shaw says, however, that "it was the plaintiff's own fault that his cow was at large in the highway, and entered the defendant's drove." Yet if the defendant had driven the cow to New Hampshire and pastured her there with his cattle, knowing that she belonged to the plaintiff and intending to deprive him of her, there can be no doubt that it would have been a conversion.

Parker v. Lombard, 100 Mass. 405, and *Loring v. Mulcahy*, 3 Allen, 575, were both decided upon the ground that the defendant neither assumed to dispose of the property as his own, nor intended to withhold the property from the plaintiff.

Nelson v. Whetmore, 1 Rich. 318, was an action of trover for the conversion of a slave, who was travelling as free in a public conveyance, and was taken as a servant by the defendant; and the decision was, that to constitute a conversion the defendant must have known that he was a slave.

In *Gilmore v. Newton*, 9 Allen, 171, the defendant not only exercised dominion over the horse, by holding him as a horse to which he had the title by purchase, but also by letting him to a third person. The defendant actually intended to treat the horse as his own.

If a person wrongfully exercises acts of ownership or of dominion over property under a mistaken view of his rights, the tort, notwithstanding his mistake, may still be a conversion, because he has both claimed and exercised over it the rights of an owner; but whether an act involving the temporary use, control or detention of property implies an assertion of a right of dominion over it, may well depend upon the circumstances of the case and the intention of the person dealing with the property. *Fouldes v. Willoughby*, *ubi supra*. *Wilson v. McLaughlin*, *ubi supra*. *Nelson v. Merriam*, 4 Pick. 249. *Houghton v. Butler*, 4 T. R. 364. *Heald v. Carey*, 11 C. B. 977.

In the case at bar, the use made of the horse by the defendant was not of a different kind from that contemplated by the contract between the parties, but the horse was driven by the defendant, on his return to Worcester, a longer distance than was contemplated, and on a different road. If it be said that the defendant intended to drive the horse where in fact he did drive him, yet he did not intend to violate his contract or to exercise any control over the horse inconsistent with it. There is no evidence that the defendant was not

¹ Compare *Doolittle v. Shaw*, 92 Ia. 348.

at all times intending to return the horse to the plaintiff, according to his contract, or that whatever he did was not done for that purpose, or that he ever intended to assume any control or dominion over the horse against the rights of the owner. After he discovered that he had taken the wrong road, he did what seemed best to him in order to return to Worcester. Such acts cannot be considered a conversion.

Whether a person who hires a horse to drive from one place to another is not bound to know or ascertain the roads usually travelled between the places, and is not liable for all damages proximately caused by any deviation from the usual ways, need not be considered.

An action on the case for driving a horse beyond the place to which he was hired to go, was apparently known to the common law a long time before the declaration in trover was invented. 21 Edw. IV. 75, pl. 9.

Exceptions sustained.

BRISTOL v. BURT.

Supreme Court of New York, November, 1810. 7 Johns. 254.

THIS was an action of trover, brought to recover the value of ninety-five barrels of potashes. The cause was tried at the Onondaga Circuit, the 7th of June, 1810, before the Chief Justice.

The defendant was in 1808, and still is, the collector of the port of Oswego, on the south side of Lake Ontario. In May, 1808, the defendant was applied to, to know whether he would grant clearances for ashes for the port of Sackett's Harbor, which is the next adjoining port in the county of Jefferson, and on the south side of the lake, and adjacent to the province of Canada. The defendant answered that he did and should continue to grant clearances; and the defendant was informed of the intention of the plaintiff to bring ashes to Oswego, for the purpose of sending them to Sackett's Harbor. About the 1st of July, the plaintiff sent ninety-five barrels of potashes to Oswego, which were put into the store of a Mr. Wentworth, who gave the plaintiff a receipt for them. The plaintiff applied to the defendant for a clearance, in order to transport the ashes to Sackett's Harbor; but the defendant refused to grant it, alleging as a reason for his refusal that though he did not suspect the plaintiff intended to send the ashes to a British port, yet he believed that the collector at Sackett's Harbor would not do his duty, and that the ashes would be sent thence to a British port. The defendant at the same time promised the plaintiff that, if he did not receive instructions to the contrary from the Secretary of the Treasury within a fortnight, he would give a clearance to the plaintiff's ashes. After the expiration of that

time, the defendant still refused to grant the clearance, though he admitted that he had received no new instructions from the Secretary of the Treasury, nor had he received any instructions forbidding such clearances. He assigned no other reason for his refusal than his suspicion that the collector at Sackett's Harbor would not do his duty; and persisted in refusing a clearance, though the plaintiff offered to give bonds that the ashes should be delivered at Sackett's Harbor. The plaintiff then expressed his desire to take the ashes up the river; but the defendant declared that the plaintiff should not take them from Wentworth's store, unless he gave bonds for double the value of the property, to carry the ashes to Rome, in the county of Oneida, and leave them there, while the embargo continued; that the property was under his jurisdiction and charge; that he had control over all the stores and wharves where ashes were placed, and had employed armed men; and that he had the right to prevent their removal, and would exercise it. Two armed men were stationed near Wentworth's store during two nights, and an armed sentinel was constantly on duty, night and day, at the public store of the collector, within ten rods of Wentworth's store, and in view of it, for the purpose of observing boats, and preventing the removal of the property. The defendant avowed his determination not to permit any ashes to be removed from any of the stores in Oswego. The defendant demanded the ashes in question from Wentworth, who refused to deliver them; but, in order to prevent the defendant from proceeding to extremities, and to satisfy him, Wentworth entered into an agreement with the defendant not to deliver any property from his store without the permission of the defendant.

In the autumn of 1808, the defendant gave a general permission to remove any ashes from Oswego up the river, and thirteen barrels of the potash of the plaintiff were delivered by Wentworth to his order.

On the 13th February, 1809, the defendant gave a written permit to carry the remaining eighty-two barrels of potashes from Oswego to Rome, in the county of Oneida, requiring of the person to whom they were delivered by order of the plaintiff a written report of the ashes, and an oath that the statement was true, and that he did not intend to violate the law.

It was proved that, when the plaintiff applied to the defendant for a clearance to Sackett's Harbor, potashes were worth at that place \$180 per ton, and that the expense of transportation was \$4 per ton. That the price of potashes on the 21st July, 1808, in the city of New York, was \$173 per ton, but would not sell at Salina, in the county of Onondaga, for more than \$150. That when the plaintiff received the ashes, the price of them, in the city of Albany, was \$173.50, and the expense of transportation from \$25 to \$30 per ton.

The Chief Justice charged the jury that, in his opinion, there was

sufficient evidence of a conversion by the defendant, and that the plaintiff was entitled to recover for the difference in the value of the ashes at the time when he demanded a clearance and at the time he received them. And the jury found a verdict for the plaintiff, for \$1,472.20.

A case was made for the opinion of the court, which it was agreed might be turned into a special verdict.

PER CURIAM. The only point made in this case is, whether there was sufficient evidence of a conversion to justify the verdict.

There were declarations and acts of the defendant united to form a control over the plaintiff's property. The very denial of goods to him that has a right to demand them, says Lord Holt, in *Baldwin v. Cole*, 6 Mod. 212, is a conversion; for what is a conversion but an assuming upon one's self the property and right of disposing of another's goods? And he that takes upon himself to detain another man's goods from him without a cause, takes upon himself the right of disposing of them. The bare denial to deliver is not always a conversion, as in *Thimblethorpe's Case* (cited in *Bulst.* 310, 314), where a piece of timber was left upon the land of the defendant by the lessee at the expiration of his term, and he was requested to deliver it and refused, but suffered the timber to lie without intermeddling with it. The reason why this was held not to be a conversion was, that there was no act done or dominion exercised; but in the present case there were the highest and most unequivocal acts of dominion and control over the property; not only by claiming jurisdiction over it, but in placing armed men near it to prevent its removal. This fact is of itself a conversion. It is intermeddling with the property in the most decisive manner, and detaining it for months in the storehouse. It was, therefore, bringing a charge upon the plaintiff; and this, says Mr. Justice Buller, in *Syeds v. Hay*, 4 Term Rep. 260, amounts to a conversion. Neither the case of *M'Combie v. Davies*, 6 East, 538, nor the anonymous case in 12 Mod. 344, were so strong as this, and yet the conversion was maintained. It was assuming the dominion of the property which was made by Lord Ellenborough the test of the conversion, though the property in that case lay not in the defendant's, but in the king's warehouse. The definition of a conversion in trover, as given by Mr. Gwillim, the editor of *Bacon*, and now a judge in India, applies precisely to this case. 6 Bac. Abr. 677. "The action being founded upon a conjunct right of property and possession, any act of the defendant," says he, "which negatives, or is inconsistent with such right, amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance

of the plaintiff's right? If he does, that is, in law, a conversion, be it for his own or another person's use."

We are, therefore, of opinion that the motion to set aside the verdict must be denied.

Motion denied.

ARMORY v. DELAMIRIE.

In Middlesex, coram Pratt, C. J., 1722. 1 Strange, 505.

THE plaintiff, being a chimney-sweeper's boy, found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who, under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three half-pence, the master offered the boy the money, who refused to take it, and insisted on having the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:—

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.¹

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect. *Jones v. Hart*, 2 Salk. 441, cor. Holt, C. J.; *Mead v. Hamond*, 1 Strange, 505; *Grammer v. Nixon*, Ib. 653.

3. As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages; which they accordingly did.

SARGENT v. GILE.

Supreme Court of New Hampshire, December, 1836. 8 N. H. 325.

ACTION of trover for household furniture.

On the 14th day of June, 1834, the plaintiffs delivered the furniture to one Wilson, under an agreement that if Wilson paid for it in six months, he was to have it at cost; and if not paid for in that time, then he was to pay twenty-five per cent. of the cost for the use of it.

¹ Compare *Haythorne v. Rushford*, ante, p. 482.

On June 17th of the same year, Wilson sold the furniture to the defendants who knew nothing of the agreement between Wilson and the plaintiffs.

On the same day, the plaintiffs demanded the furniture of the defendants, who replied that they had bought it of Wilson, supposing that he was the owner of it, and that they should not deliver it up to the plaintiffs, at present.

The plaintiffs brought the present suit on the 24th day of June.

Upon the trial a verdict was directed for the plaintiffs, subject to be set aside, if, upon the foregoing facts, the action could not be maintained.

PARKER, J. In *Vincent v. Pardon Cornell*, 13 Pick. 294, the plaintiff, in February, exchanged oxen with William Cornell, under an agreement that he should pay the plaintiff a certain sum by the 7th of May following; and it was agreed, in order to secure the plaintiff, that Cornell should keep the oxen until the 7th of May, and return them at that time, unless the sum was paid; but if the money was paid, the plaintiff was to release his right to them.

Before the time, William Cornell sold them to the defendant, and the defendant to one Tripp, and after the 7th of May the plaintiff demanded them of the defendant, and brought trover. The court held that the agreement amounted to a conditional sale—that William Cornell had, therefore, a right to dispose of the possession, with his right, such as it was—that the plaintiff had no possession, or right of possession, and that the taking by the defendant, and his sale to Tripp, did not therefore amount to a conversion. Mr. Justice Wilde said it had been argued, that the sale by William Cornell was such a breach of trust as to terminate the bailment, and to restore to the plaintiff a right of possession, but the argument could not be sustained.

Were we to adopt all the conclusions in that case, this action must fail. But in *Sanborn v. Colman*, 6 N. H. Rep. 14, where the plaintiff, being the owner of a mare, had let her, on the 1st February, 1830, for hire, to Brown, for four weeks, and Brown sold her within five days afterwards, to the defendant; and the plaintiff demanded her, within the four weeks, of the defendant, who refused to deliver her,—this court held that the sale of the mare put an end to the contract between Brown and the plaintiff, and that the plaintiff might maintain trover.

We have re-considered that case, and are satisfied with the decision. Unless, therefore, the fact, that by the original contract between these plaintiffs and Wilson, the latter had a right to pay for the furniture within the six months, changes the nature of the case, we must hold that this action is well sustained, and we are all of opinion that this does not effect the principle.

It has been held, that where one receives goods and chattels of

another, on a contract by which he has a right to return them or pay a stipulated price or a right to return them or other goods, the property passes, and he is regarded a purchaser. 3 Mason's Rep. 478, *Buffum v. Merry*; Story on Bailment, 286; 1 Fair. Rep. 31, *Holbrook v. Armstrong*; 7 Cowen, 752, *Hurd v. West*; 2 Kent's Com. 463. If that be so, Wilson in this case had no option to return any other furniture, and there was an express stipulation that the property should not be his until the price was paid. He cannot be regarded as a purchaser against the express agreement of the parties, and it is not contended that the property had passed. 4 Mass. 405, *Hussey v. Thornton*; 17 Mass. 606, *Marston v. Baldwin*. He was a bailee for hire, for a certain time, with a right to purchase if within that time he paid the price. This he had not done when he sold; and the contract by which he gained the right to purchase conferred on him no right to sell, nor in any manner enlarged his right as bailee. The goods still remained the property of the plaintiffs. When, therefore, he undertook to sell, and delivered the plaintiff's goods to others, in violation of any right which he then had, or for aught which appeared, ever would have, he forfeited the right to hold and use, and waived all benefit of it, having voluntarily deprived himself of that right — and the defendants could gain no right of possession, because Wilson had no power to communicate any such right to them. He had no interest which he could sell. 6 Green. Rep. 205.

These principles seem to be sound in themselves, and the authorities appear fully to sustain them.

In *Farrant v. Thompson*, 5 B. & Ald. 826, where certain mill machinery, together with a mill, had been demised for a term to a tenant, and he, without permission of his landlord, severed the machinery from the mill, and it was afterwards seized under a fieri facias by the sheriff, and sold by him, it was held that no property passed to the vendee, and that the landlord was entitled to bring trover for the machinery, even during the continuance of the term. The court took a distinction between that case and *Gordon v. Harper*, 7 D. & E. 9, that in the latter case the goods removed were personal chattels, and the tenant had not by any wrongful act put an end to his qualified possession of them; and on this ground *Pain v. Whitaker*, Ryan & Moody 99, in no way conflicts with *Farrant v. Thompson*.

In *Wilkinson v. King*, 2 Camp. 335, the owner of goods sent them to a wharf where goods of the same sort were usually sold. The wharfinger, without any authority, sold them to a bona fide purchaser, who duly paid for them. Held, that the sale did not change the property, and that the owner might maintain trover against the purchaser.

In *Loeschman v. Machin*, 2 Stark. Rep. 311, where Brown, who had hired a piano of the plaintiff, sent it to the defendant to be sold by

auction, and the defendant, on the plaintiff's application, refused to deliver it — held, that he was liable in trover.

In *Samuel v. Morris*, 6 Car. & Payne, 620, the plaintiff had pledged certain goods to one James, to secure the payment of a debt. Mr. Baron Park said, if James had sold the goods it would have been such a wrongful act, and so inconsistent with the bailment, as to have immediately revested the right of possession in the bailor.

In *Emerson v. Fisk*, 6 Green. 200, where Michael & Alexander had made a contract with the plaintiff to cut certain pine timber, to transport one-fourth to a certain place for the owner, and to transport the other three-fourths to the same place, and agreed that the plaintiff should retain the ownership until satisfied that the quarter part first named was of an average quality with the whole, and until he was paid all debts due to him from M. & A. &c., and they sold their interest to the defendants, and the plaintiff replevied the logs while in transitu, — it was held, that the contractors had no authority to sell the logs — that if they had a special property, it was only as bailees for a special purpose — that the sale was entirely inconsistent with the rights of the plaintiff, as general owner — that by this unauthorized act the bailment, and their authority under it, was determined, and that the defendants could derive no rights from the tortious act of Michael & Alexander.

And in *Galvin v. Bacon*, 2 Fairfield 28, the plaintiff, being the owner of a horse, bailed him to A, for use for a limited period, under the expectation of a purchase by the latter; and during the time, A, for a valuable consideration, and without notice, sold the horse to B, and he in like manner to the defendant. It was held, that no previous demand was necessary, to enable the owner to maintain replevin against the last purchaser.

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The plaintiff being the owner of the goods, and having a right of possession, the only remaining question is, Does the case show a conversion by the defendants?

In *Robinson v. Burleigh*, 5 N. H. Rep. 225, it was held that a refusal to deliver goods when demanded is only evidence of a conversion, and when such refusal may be considered only as a result of a reasonable hesitation, in a doubtful matter, it is not sufficient evidence to prove a conversion. And this decision has been followed in subsequent cases. *Fletcher v. Fletcher*, 7 N. H. Rep. 452. Vide, also, 3 Stark. Ev. 1499; 5 B. & Ald. 247, *Alexander v. Southey*.

But in this case, all the defendants could require was time to examine into the right of the plaintiffs; and ample time appears to have been given for such examination, before this action was commenced. It was not necessary for the plaintiffs to make another demand. They were only bound to wait a reasonable time before

commencing their suit, to give the defendants an opportunity to enquire and comply; and the plaintiffs having done this, the demand and refusal, and subsequent neglect, are sufficient evidence of a conversion.

It is not material, therefore, to enquire whether the action might not have been sustained without any demand. 2 Fair. R. 30.

*Judgment for the plaintiffs.*¹

THURSTON v. BLANCHARD.

Supreme Court of Massachusetts, March, 1839. 22 Pick. 18.

TROVER, to recover the value of certain goods alleged to have been obtained by the defendant, from the plaintiffs, by means of false and fraudulent pretences.

The trial was before Putnam, J. It appeared, that the goods were purchased of the plaintiffs by the defendant, by means of false representations, on or about the 22d day of March, 1837, for the sum of \$677.77; that the defendant gave his negotiable promissory note for the amount, payable in six months; that such note had been in the possession of the plaintiffs ever since it was given; that they had never offered to give it up to the defendant; and that they had not made a demand upon him, for the goods, before commencing this suit. The plaintiffs however produced the note in court, at the trial, and there offered to give it up, or to put it on the files of the court; but the defendant declined taking it, and it was placed on the files.

The defendant offered no evidence in his defence, but relied upon the facts, that the note had not been given up or tendered to him by the plaintiffs, and that no demand had been made upon him for a return of the goods.

A verdict was taken for the plaintiffs, by consent.

If the Court should be of opinion, that the action could be maintained, judgment was to be rendered on the verdict; otherwise, the plaintiffs were to be nonsuited.

SHAW, C. J. We are now to take it as proved in point of fact, to the satisfaction of the jury, that the goods, for which this action of trover is brought, were obtained from the plaintiffs by a sale, but that this sale was influenced and effected by the false and fraudulent representations of the defendant. Such being the case, we think the plaintiffs were entitled to maintain their action, without a previous demand. Such demand, and a refusal to deliver, are evidence of conversion when the possession of the defendant is not tortious; but when the goods have been tortiously obtained, the fact is sufficient evidence of conversion. Such a sale, obtained under false and fraudulent representations, may be avoided by the vendor, and he may insist

¹ Cf. Bailey v. Colby, 34 N. H. 29.

that no title passed to the vendee, or any person taking under him, other than a bona fide purchaser for value and without notice, and in such case the seller may maintain replevin or trover for his goods. *Buffinton v. Gerrish*, 15 Mass. R. 156.

The only important question is, whether the plaintiffs had done enough to rescind the contract and reclaim their goods in this action, without first tendering back the note of the defendant, which they had received on the sale. We are to take it as proved, that this was a negotiable note; that it had not been negotiated, either at the time the action was brought, or at the trial, or at any time; on the contrary, that it had always remained with the plaintiffs undorsed, and was produced at the trial and offered to be surrendered, and placed on the files of the court for the defendant's use.

The rule undoubtedly is, that if the vendor under such circumstances would rescind the contract, and take back his property, if he has received a valuable consideration, he must restore it, whether it be money or goods, or the negotiable security of a third person. *Kimball v. Cunningham*, 4 Mass. R. 502.

The precise question then is this, whether the vendee's own note not negotiated, comes within the rule. Had it not been negotiable, we think it quite clear, that there would be no necessity of returning it. Rescinding the contract for the sale, rescinds the contract of payment by the vendee. A note not negotiable, would have been nothing more than an express promise to pay for the goods, and would have been avoided with the sale. The Court are of opinion, that a note, though payable to order, whilst it remains in the hands of the promisee, the vendor of the goods, is to be put on the same footing, and that the delivering it up was not a condition precedent to bringing the action. If not produced at the trial, to be surrendered, it might be presumed that it had been negotiated, and that would have been a bar to the action, upon the rule stated.

It is somewhat analogous to a class of cases, which, though they do not arise here on account of our rule, treating a negotiable note given for goods sold as payment, yet are common in England and New York, where a different rule prevails. When a note is given on a sale of goods, but is not paid at maturity, the action is brought for goods sold, and the note is produced at the trial, to be surrendered, and to show that it is not outstanding. If not thus produced, the presumption would be, that it had been negotiated and was outstanding; and if it was so, the vendor could not recover as for goods sold. The negotiable security, actually negotiated and outstanding, would be deemed payment. But if not outstanding, such negotiable security would be deemed as only a collateral promise for the payment of the goods, and need not be tendered before bringing the action for goods sold and delivered.

Judgment on the verdict for the plaintiffs.

HENDERSON & CO. v. WILLIAMS.

Court of Appeal of England, December, 1894. 1895, 1 Q. B. 521.

ACTION for damages for conversion of 150 bags of sugar. The plaintiffs were sugar merchants at Hull. The defendant was a warehouseman carrying on business at Hull and Goole. On June 3, 1894, one Fletcher, by pretending that he was Robinson, negotiated a purchase of 150 bags R. A. V. sugar from Messrs. Grey & Co., sugar merchants, of Liverpool, they believing that they were dealing with Robinson, a well-known customer of theirs, through Fletcher as his agent. On June 6, Grey & Co. sent to the defendant, who then held the 150 bags of sugar in a warehouse at Goole, the following telegram: "Transfer to order of Fletcher, Leeds, 150 R. A. V." The defendant, on the same day, replied by letter, in which he said, "I have your telegram to transfer the balance (150 bags) to Mr. W. Fletcher, Leeds, at whose disposal I have placed the sugar. Please note."

On the same day, and before receipt of defendant's letter, Grey & Co. wrote a letter to the defendant, confirming their telegram.

Subsequently, Fletcher negotiated with the plaintiffs to sell the sugar to them, together with some other sugar which was in the defendant's warehouse. At this time Fletcher was indebted to the plaintiffs in the sum of £131, for which he had given a cheque which had been returned dishonored; and as Fletcher required to be paid in cash, the plaintiffs, before concluding any contract with Fletcher, sent to the defendant inquiring if he had the sugar, proposed to be sold by Fletcher, in his warehouse to Fletcher's order. To this, the defendant replied that he had; and subsequently, the plaintiffs not being satisfied, the defendant wrote upon a memorandum of the parcels of sugar held to Fletcher's order by him: "I hold the within at your order and disposal." The memorandum was then sent by the defendant to the plaintiffs. Thereupon the plaintiffs purchased the sugar of Fletcher, and after deducting Fletcher's indebtedness to them, handed him a cheque for the balance, which Fletcher cashed in due course.

Grey & Co., having discovered Fletcher's fraud, notified the defendant to withhold the 150 bags and indemnified him for so doing. The defendant accordingly refused to deliver the 150 bags to the plaintiffs.

At the trial, before Cave, J., the plaintiffs had a verdict, and the defendant appealed.¹

LORD HALSBURY. . . [His Lordship briefly stated the facts, and referred to the letter of June 6, from Williams to Grey & Co.,

¹ Further details of the transaction between Fletcher and the plaintiffs, raising a question of damages, are omitted.

acknowledging receipt of latter's telegram, and the letter of Grey & Co., of the same date, to Williams, confirming the telegram.]

Mr. Williams having duly carried out the instructions contained in the telegram and letter, Mr. Fletcher, who was a fraudulent person, entered into negotiations with the present plaintiffs for the purpose of a sale of the sugar to them. The sale was effected and the transaction concluded in a manner which I will describe presently.

I pause here to consider what was at this time the relative situation of the parties. Grey & Co., the real owners of the goods, had placed with full powers of disposition these sugars in the name of Mr. Fletcher. If the question now to be determined was whether or not any property passed under these circumstances to Mr. Fletcher, I should say that, inasmuch as Fletcher was only the designated consignee and not a person purporting to enter into a bargain or a contract at all, no such property would pass at all; and I think that that view would be in accordance with the decision in *Kingsford v. Merry*,¹ with respect to which I have to say a word or two presently. But that is not the position in which I regard the transaction so far. It appears to me that quite apart from any contract which might be affirmed or disaffirmed afterwards, the question here is whether the true owner of the goods has so invested the person dealing with them with the indicia of property as that when an innocent person enters into a negotiation with the person to whom these things have been entrusted with the indicia of property the true owner of the goods cannot afterwards complain that there was no authority to make such a bargain. . . .

[His Lordship here discussed at length the case of *Kingsford v. Merry*, 1 H. & N. 503, and proceeded:]

But it is remarkable to observe that in giving that judgment, and upon the argument in that case, it is expressly distinguished from those cases in which a person has given the indicia of title to another so as to enable him to pass as the true owner; and a long line of authorities, of which I have only selected two, establishes conclusively that where that is the case it is no longer a question of affirming or disaffirming any contract between the owner of the goods, but a question whether the owner of the goods has by his conduct allowed the person who has either cheated him or to whom he has intrusted goods to hold himself out as the owner so as to give a good title to a bona fide purchaser for value. In *Williams v. Barton*,² Best, C. J., after dealing with the facts of that case, which are not material to my purpose, and after speaking of the power of obtaining a good title in market overt, says: "The exception in our law proves that if a person acquires the possession of property in any mode, other than that of sale in market overt, he cannot keep it against the owner; it proves

¹ 1 H. & N. 503.

² 3 Blig. 139.

at the same time, that, as commerce is now carried on, the purchaser or pawnee should have the same protection against him who permits another to deal with his property, as if it were his own." And again, in *Dyer v. Pearson*,¹ Abbott, C. J., says, referring to the case before him: "We all think that there ought to be a new trial in this case. The question which I left to the consideration of the jury does not appear to me to have embraced the whole case. The general rule of the law of England is, that a man who has no authority to sell, cannot, by making a sale, transfer the property to another. There is one exception to that rule, namely, the case of sales in market overt. This was not a sale in market overt and therefore does not fall within the exception. Now this being the rule of law, I ought either to have told the jury, that even if there was an unsuspecting purchase by the defendants, yet as Smith had no authority to sell, they should find their verdict for the plaintiffs; or I should have left it to the jury to say, whether the plaintiffs had by their own conduct enabled Smith to hold himself forth to the world as having not the possession only, but the property; for if the real owner of goods suffer another to have possession of his property, and of those documents which are the indicia of property, then perhaps, a sale by such a person would bind the true owner."

Now, I have thought it right to deal here as if the only parties to this question were the true owner of the goods and the purchaser for value. The question, of course, arises here in a different form, although perhaps only circuitously. Here the warehouse-keeper has been induced to attorn to the ownership of the fraudulent person Fletcher, and in that character to transfer to Fletcher and to Fletcher's order the property intrusted to his charge; and I am of opinion that it would be impossible for him to resist an action by the person to whose title he has attorned if no other question existed in the case.

This is an action in which it is admitted that the warehouse-keeper is acting under the indemnity of Grey & Co., and I have thought it right to trace the question up to its source, and to treat Grey & Co., the true owners, as the persons who are the practical defendants in this case. Treating Grey & Co. as the defendants in this case, I am of opinion that upon these facts they have no answer. The real truth is that Grey & Co. are the persons who have permitted this fraud to be committed, by intrusting the goods to the order and disposition of Fletcher; and apart from the authorities to which I have already referred, I think that it is not undesirable to refer to an American authority, which I observe, was quoted in the case of *Kingsford v. Merry*,² *Root v. French*,³ in which, in the Supreme Court of New York, Savage, C. J., makes observations which seem to me to be well worthy of consideration. Speaking of a bona fide purchaser who

¹ 3 B. & C. 38.

² 1 H. & N. 503.

³ 13 Wend. 570, and see Kent's Comm. II. 514.

has purchased property from a fraudulent vendee and given value for it, he says: "He is protected in doing so upon the principle just stated, that when one of two innocent persons must suffer from the fraud of a third, he shall suffer, who, by his indiscretion, has enabled such third person to commit the fraud. A contrary principle would endanger the security of commercial transactions, and destroy that confidence upon which what is called the usual course of trade materially rests."

It appears to me, therefore, that when once the correspondence is looked at upon which these goods were committed to Fletcher, to his order and disposition, and Fletcher was invested with a full power of disposition, it is impossible to argue that this was not a holding out, by the true owner of the goods, of Fletcher as capable of giving a good title. It is admitted that the present plaintiffs dealt bona fide with the person who was thus in the complete dominion of the property in question, and was, under these circumstances, and from this correspondence, held out by the true owners of the goods as the owner, and with whom therefore any contract made innocently by a bona fide purchaser for value would be protected.

Lindley and A. L. Smith, L. JJ., delivered concurring opinions.

Defendant's appeal dismissed.

ASHTON v. ALLEN.

Supreme Court of New Jersey, November, 1903. 70 N. J. L. 117.

THE case is stated in the opinion.

GARRETSON, J. This is an appeal by the plaintiff from a judgment entered in the District Court of Trenton in favor of the defendant.

The following are the facts agreed upon by the parties to this suit:

On or about August 14th, 1901, the plaintiff was possessed of one hundred and fifty pounds of oats, valued at \$69; that some person to the plaintiff unknown, representing himself as the agent of O. O. Bowman, or of O. O. Bowman & Son, requested the plaintiff to deliver the oats at the stable of the said Bowman, saying that the oats were wanted by the said Bowman; that the said unknown person also obtained permission from the said Bowman's servant to have the said oats deposited upon his premises; that the said plaintiff thereupon delivered said oats at the stable of the said Bowman, depositing the same at the entrance of the stable or stable-yard of the said Bowman, where the man delivering the same was requested to deposit said oats. The said oats were charged upon the books of the plaintiff to the said Bowman; that the said plaintiff did not give credit to said unknown person who represented himself as the agent of the said

Bowman, but afterwards the said unknown person procured a conveyance and carted said oats, which were in bags of said plaintiff, marked with plaintiff's name, from the place where they had been so deposited by the driver of the said plaintiff and took them to the defendants' place of business, where the defendants, in the usual course of business, purchased the said oats from the said unknown person, who represented himself as the owner thereof and received pay for the same from the defendants, and the said defendants received possession and retained possession of the said oats.

The said defendants were bona fide purchasers of said oats for a valuable consideration, and without notice of any fraud or misdoing upon the part of the said unknown person or any other person in connection with said transaction.

It is clear from the foregoing statement of facts that it was never the intention of the plaintiff to part with his title in or possession of the oats or to deliver them to the unknown person. His intention was to transfer the title and possession to Bowman. It is not one of those cases in which the owner of goods, relying upon false representations which he believed to be true, parts with the title and possession of his goods, intending to transfer them to the maker of the false representations. In such cases the title to the goods actually passes out of the owner and he intends it shall so pass to the one making the false representations. In such case he may avoid his contract, but if, before that is done, this wrongdoer has parted with the title to an innocent purchaser, the original owner is without remedy against such innocent purchaser.

To this effect are the cases *Rowley v. Bigelow*, 12 Pick. 307, and *Hoffman v. Noble*, 6 Met. 68.

But where the vendor has not parted with the title to the one making the false representations, the latter has no title to transfer — no contract of sale ever existed between them.

In 1 Benj. Sales (Corbin's notes), s. 648, the rule is stated to be: "Whenever goods are obtained from their owner by fraud, we must distinguish whether the facts show a sale to the party guilty of the fraud or a mere delivery of the goods into his possession induced by fraudulent devices on his part. In other words, we must ask whether the owner intended to transfer both the property in, and the possession of, the goods to the person guilty of the fraud, or to deliver nothing more than the bare possession. In the former case there is a contract of sale, however fraudulent the device, and the property passes; but not in the latter case. Section 649. In the former case the contract is voidable at the election of the vendor, not void ab initio. It follows, therefore, that the vendor may affirm and enforce it or may rescind it. He may sue in assumpsit for the price and this affirms the contract, or he may sue in trover for the goods or their value and this disaffirms it. But in the meantime, and until he elects, if the vendee

transfer the goods in whole or in part, whether the transfer be of a general or special property in them, to an innocent third person for a valuable consideration, the rights of the original vendor will be subordinate to those of such innocent third person. If, on the contrary, the intention of the vendor was not to pass the property, but merely to part with the possession of the goods, there is no sale, and he who obtains possession by fraud can convey no property in them to any third person, however innocent, for no property has passed to himself from the true owner." *Cundy v. Lindsay*, L. R., 3 App. Cas. 459; *Hardman v. Booth*, 1 Hurlst. & C. 803; *Higgins v. Barton*, 26 L. J. Exch. 342; *Dean v. Yates*, 23 Ohio St. 388; *Hamet v. Letcher*, 37 Id. 356; *Moody v. Blake*, 117 Mass. 23; *Barker v. Dinsmore*, 72 Pa. 427; *Decan v. Shipper*, 35 Id. 239.

The judgment below will be reversed and judgment entered for the plaintiff for \$69 and costs.

DONALD v. SUCKLING.

Queen's Bench of England, July, 1866. L. R. 1 Q. B. 585.

DECLARATION. That the defendant detained from the plaintiff his securities for money, that is to say, four debentures of the British Slate Company, Limited, for £200 each, and the plaintiff claimed a return of the securities, or their value, and £1000 for their detention.

Plea. That before the alleged detention the plaintiff deposited the debentures with one J. A. Simpson, as security for the due payment at maturity of a bill of exchange, dated 25th August, 1864, payable six months after date, and drawn by the plaintiff, and accepted by T. Sanders, and indorsed by the plaintiff to and discounted by Simpson, and upon the agreement then come to between the plaintiff and Simpson, that Simpson should have full power to sell or otherwise dispose of the debentures if the bill was not paid when it became due. That the bill had not been paid by the plaintiff, nor by any other person, but was dishonored; nor was it paid at the time of the said detention, or at the commencement of this suit; and that, before the alleged detention and the commencement of this suit, Simpson deposited the debentures with the defendant, to be by him kept as a security for and until the repayment by Simpson to the defendant of certain sums of money advanced and lent by the defendant to Simpson upon the security of the debentures, and the defendant had and received the same for the purpose and on the terms aforesaid, which sums of money thence hitherto have been and remain wholly due and unpaid to the defendant; wherefore the defendant detained and still detains the debentures, which is the alleged detention.

Demurrer and joinder.

The case having been argued in Easter Term (April 27), before Blackburn and Shee, JJ., was re-argued in Trinity Term.

Cur. adv. vult.

MELLOR, J. [after stating the declaration and plea]. To this plea the plaintiff demurred; and upon demurrer I think that we must assume that the pledging of the debentures by Simpson to the defendant took place before the default was made by the plaintiff in payment of the bill of exchange at maturity, and that we must also assume that the money for which the debentures were pledged by Simpson, as a security to the defendant, was of larger amount than the amount of the bill of exchange discounted for the plaintiff by Simpson. The question thus raised by this plea is, whether a pawnee of debentures, deposited with him as a security for the due payment of money at a certain time, does, by repledging such debentures and depositing them with a third person as a security for a larger amount, before any defaulting payment by the pawnor, make void the contract upon which they were deposited with the pawnee, so as to vest in the pawnor an immediate right to the possession thereof, notwithstanding that the debt due by him to the original pawnee remains unpaid. If the affirmative of this proposition be maintained, the result seems *prima facie* to be disproportionate to any injury which the pawnor would be likely to sustain from the fact of his debentures having been repledged before default made. Still, if the principles of law, as laid down in decided cases, satisfactorily support the proposition above stated, this court must give effect to them. There is a well-recognized distinction between a *lien* and a *pledge*, as regards the powers of a person entitled to a lien and the powers of the person who holds goods upon an agreement of deposit by way of pawn or pledge for the due payment of money. In the case of simple lien there can be no power of sale or disposition of the goods which is inconsistent with the retention of the possession by the person entitled to the lien; whereas, in the case of a pledge or pawn of goods to secure the payment of money at a certain day, on default by the pawnor the pawnee may sell the goods deposited and realize the amount, and become a trustee for the overplus for the pawnor; or, even if no day of payment be named, he may, upon waiting a reasonable time, and taking the proper steps, realize his debt in like manner. It is said by Mr. Justice Story on Bailments, tit. Pawns or Pledges, § 311, that "the foundation of the distinction rests in this, that the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation; but, in the case of a lien, nothing is supposed to be given but a right of retention or detainer, unless under special circumstances." The question thus arises, Is the right of retention in case of a lien, either by a custom or contract, otherwise different from a deposit, by way of pledge for securing the due payment of money, than in the incidental power of sale in the latter case on condition

broken? In other words, on a contract of pledge, it is implied that the pledgee shall not part with the possession of the thing pledged until default in payment; and, if so, is that of the essence of the contract, *so that the violation of it makes void the contract?*

In the case of *Legg v. Evans*, 6 M. & W. 36, 41, an action of trover having been brought against the defendants, as sheriffs of Middlesex, to recover the value of some pictures and picture-frames, the defendants justified under an execution against the goods and chattels of the plaintiff, to which the plaintiff replied setting up a lien in respect of work done upon such goods and chattels, which had been delivered to him in the way of his trade by one Williams, and further set up an agreement between the plaintiff and Williams that the plaintiff should draw and indorse certain bills of exchange for the use of Williams, and should have a right to hold the said goods for securing the payment by Williams of the amount of the said bills of exchange; and he alleged that the said money and bills of exchange then remained wholly unpaid. The Court of Exchequer held, on demurrer to the replication, that it was a good answer to the plea; and Parke, B., is reported to have said: "If we consider the nature of a lien and *the right* which it confers, it will be evident that it cannot form the subject-matter of a sale. A lien is a *personal right* which cannot be parted with, and continues only so long as the possessor holds the goods. It is clear, therefore, that the sheriff cannot sell an interest of this description, which is a personal interest in the goods." And farther on he said, "Here the interest cannot be transferred to any other individual; it continues only as long as the holder keeps possession of the subject-matter of the lien, either by himself or his servant." In that case there was superadded to the lien in respect of work done an agreement that the person entitled to the lien should have a right to hold the said goods and chattels for securing the payment of the bills of exchange therein mentioned, and which then remained wholly unpaid. That case was treated as a simple case of lien or right "to hold" to secure the payment, not only of the amount due for work done on the goods by Williams, but also of the bills drawn and indorsed by him. It is, therefore, an authority to the effect that in the case of lien, even to secure payment of money advanced, there is no implication of any power to sell or otherwise dispose of the subject-matter of the lien, because retention of possession by the party entitled to the lien is an essential ingredient in it.

It appears, therefore, that there is a real distinction between a deposit by way of pledge for securing the payment of money, and a right to hold by way of lien to secure the same object. In *Pothonier v. Dawson*, Holt, N. P. at p. 385, cited in argument in *Legg v. Evans*, 6 M. & W. at p. 40, Gibbs, C. J., said, "Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods. But when goods are *deposited by way of security*, to indemnify a party against a

loan of money, it is more than a pledge. [Quære, whether "pledge" should not be read "lien."] The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade."

It appears to me that considerable confusion has been introduced into this subject by the somewhat indiscriminate use of the words "special property," as alike applicable to the right of personal retention in case of a lien, and the actual interest in the goods created by the contract of pledge to secure the payment of money. In *Legg v. Evans*, 6 M. & W. at p. 42, the nature of a lien is defined to be a "personal right which cannot be parted with;" but "the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation." Story on Bailments, § 311. In each case the *general property remains in the pawnor*; but the question is as to the nature and extent of the interest or special property passing to the bailee in the two cases. Mr. Justice Story, in his Treatise on Bailments, § 324, thus describes the right and interest of the pawnee: "He may, by the common law, deliver over the pawn into the hands of a stranger for safe custody, without consideration, or he may sell or assign all his interest in the pawn, or he may convey the same interest conditionally, by way of pawn, to another person, without in either case destroying or invalidating his security; but if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor, as if he were the absolute owner, it is clear that in such a case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee. The only question is, whether the creditor should be entitled to retain the pledge until the original debt was discharged, or whether the owner might recover the pledge in the same manner as in the case of a naked tort, without any qualified right in the first pawnee."

In *M'Combie v. Davies*, 7 East, 5 (see pp. 6 and 7), it appeared that a broker had for a debt of his own pledged with the defendant certain tobacco of his principals, upon which he had a lien; and in an action brought by the principal against the defendant in trover for the tobacco, Lord Ellenborough being of opinion "that the lien was personal, and could not be transferred by the tortious act of the broker pledging the goods of his principal," the plaintiff obtained a verdict; and upon motion for a new trial Lord Ellenborough said that "nothing could be clearer than that liens were personal, and could not be transferred to third persons by any *tortious* pledge of the principal's goods;" but he afterwards added "that he would have it fully understood that his observations were applied to a *tortious* transfer of the goods of the principal by the broker undertaking to *pledge* them *as his own*, and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of the goods on which he has the lien to that other, with

notice of his lien, and appoints that other as his servant to keep possession of the goods for him."

It would therefore seem that in the case of a broker or factor for sale, before the Factors Acts, although he had no power to pledge his principal's goods, except to the extent of his own lien, with notice of the extent of his interest, yet where he pledged the goods on which he had a lien tortiously, neither the factor nor his pawnee could retain them even for the payment of the amount of the original lien. The case of *M'Combie v. Davies*, 7 East, 5 (see pp. 6 and 7), shows that the factor's or broker's lien, although simply a right to retain possession as between him and his principal, might be transferred and made a security to a third person, provided he professed to assign it only as a security to the like amount as that due to himself. Still the character of the transaction is that of lien, and not of deposit, by way of pledge; and although the goods were intrusted to the broker for sale, and up to the time of sale remained in his hands upon a personal right to retain them for advances, yet he could not pledge them; and, if he did, the act was an essential violation of the relation betwixt him and his principal, and entitled the latter at once to the recovery of the value of the goods in trover. "But the relation of principal and factor, where money has been advanced on goods consigned for sale, is not that of pawnor and pawnee," as was said by the court in *Smart v. Sandars*, 3 C. B. at pp. 400, 401; and see s. c. after amendment of pleadings, 5 C. B. at p. 917.

There would therefore appear to be some real difference in the incidents between a simple lien, like that in *Legg v. Evans*, 6 M. & W. 36, and the lien of a broker or factor before the Factors Act, and the case of a deposit by way of pledge to secure the repayment of money, which latter more nearly resembles an ordinary mortgage. Notes to *Coggs v. Bernard*, 1 Smith's L. C. 194 (5th ed.). A lien, as we have seen, gives only a personal right to retain possession. A factor's or broker's lien was apparently attended with the additional incident, that to the extent of his lien he might transfer even the possession of the subject-matter of the lien to a third person, "appointing him as his servant to keep possession for him." In a contract of pledge for securing the payment of money, we have seen that the pawnee may sell and transfer the thing pledged on condition broken; but what implied condition is there that the pledgee shall not in the mean time part with the possession thereof to the extent of his interest? It may be that upon a deposit by way of pledge the express contract between the parties may operate so as to make a parting with the possession, even to the extent of his interest, before condition broken, so essential a violation of it as to revest the right of possession in the pawnor; but, in the absence of such terms, why are they to be implied? There may possibly be cases in which the very nature of the thing deposited might induce a jury to believe and find that it was deposited on the

understanding that the possession should not be parted with; but in the case before us, we have only to deal with the agreement which is stated in the plea. The object of the deposit is to secure the repayment of a loan, and the effect is to create an interest and a right of property in the pawnee, to the extent of the loan, in the goods deposited; but what is the authority for saying that until condition broken the pawnee has only a personal right to retain the goods in his own possession?

In *Johnson v. Stear*, 15 C. B. N. s. 330, 33 L. J. C. P. 130, one Cumming, a bankrupt, had deposited with the defendant 243 cases of brandy, to be held by him as a security for the payment of an acceptance of the bankrupt for £62 10s., discounted by the defendant, and which would become due January 29, 1863; and in case such acceptance was not paid at maturity, the defendant was to be at liberty to sell the brandy, and apply the proceeds in payment of the acceptance. On the 28th January, before the acceptance became due, the defendant contracted to sell the brandy to a third person, and on the 29th delivered to him the dock warrant, and on the 30th such third person obtained actual possession of the brandy. In an action of trover, brought by the assignee of the bankrupt, the Court of Common Pleas held that the plaintiff was entitled to recover, on the ground that the defendant wrongfully assumed to be owner in selling; and although that alone might not be a conversion, yet, by delivering over the dock warrant to the vendee in pursuance of such sale, he "interfered with the right which the bankrupt had on the 29th, if he repaid the loan;" but the majority of the court (Erle, C. J., Byles and Keating, JJ.) held, that the plaintiff was only entitled to nominal damages, on the express ground that the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created "*an interest and a right of property in the goods, which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract.*" See 15 C. B. N. s. at pp. 334, 335; 33 L. J. C. P. at p. 131. From that view of the law, as applied to the circumstances of that case, Mr. Justice Williams dissented, on the ground "that the bailment was terminated by the sale before the stipulated time, and consequently that the title of the plaintiff to the goods became as free as if the bailment had never taken place." See 15 C. B. N. s. at p. 340; 33 L. J. C. P. at p. 134. Although the dissent of that most learned judge diminishes the authority of that case as a decision on the point, and although it may be open to doubt whether in an action of trover the defendant ought not to have succeeded on the plea of not possessed, and whether the plaintiff's only remedy for damages was not by action on the contract, I am, nevertheless, of opinion that the substantial ground upon

which the majority of the court proceeded, viz., that the "act of the pawnee did not annihilate the contract, nor the interest of the pawnee in the goods," is the more consistent with the nature and incidents of a deposit by way of pledge. I think that when the true distinction between the case of a deposit, by way of pledge, of goods, for securing the payment of money, and all cases of *lien*, correctly so described, is considered, it will be seen that in the former there is no implication, in general, of a contract by the pledgee to retain the personal possession of the goods deposited; and I think that, although he cannot confer upon any third person a better title or a greater interest than he possesses, yet if, nevertheless, he does pledge the goods to a third person for a greater interest than he possesses, such an act does not *annihilate the contract of pledge* between himself and the pawnor, but that the transaction is simply inoperative as against the original pawnor, *who upon tender of the sum secured immediately becomes entitled to the possession of the goods*, and can recover in an action for any special damage which he may have sustained by reason of the act of the pawnee in repledging the goods; and I think that such is the true effect of Lord Holt's definition of a "*vadium or pawn*" in *Coggs v. Bernard*, 2 Ld. Raym. at pp. 916, 917. Although he was of opinion that the pawnee could in no case use the pledge if it would thereby be damaged, and must use due diligence in the keeping of it, and says that the creditor is bound to restore the pledge upon payment of the debt, because, by detaining it after the tender of the money, he is a wrong-doer, his special property being determined; yet he nowhere says that the misuse or abuse of the pledge before payment or tender annihilates the contract upon which the deposit took place.

If the true distinction between cases of *lien* and cases of deposit by way of pledge be kept in mind, it will, I think, suffice to determine this case in favor of the defendant, seeing that no tender of the sum secured by the original deposit is alleged to have been made by the plaintiff; and, considering the nature of the things deposited, I think that the plaintiff can have sustained no real damage by the repledging of them, and that he cannot successfully claim the immediate right to the possession of the debentures in question.

I am, therefore, of opinion that our judgment should be for the defendant.

Judgment for the defendant.

[COCKBURN, C. J. concurred that judgment should be for the defendant, upon the ground that the act of the pledgee in repledging did not put an end to the contract of pledge, so as to entitle the pledgor to bring an action of detinue, though he thought the transfer of the thing pledged amounted to a breach of contract, upon which the owner might bring an action. He hesitated to lay down the proposition that the pledgee has a *right* to transfer his interest to a third

person, saying "Such a right in the pawnee seems quite inconsistent with the undoubted right of the pledgor to have the thing pledged returned to him immediately upon tender of the amount for which the pledge was given."

BLACKBURN, J., concurred upon the ground that in *detinue*, the plaintiff's claim is based upon his right to have the chattel *itself* returned to him, and that the transfer by the pledgee to a subpledgee did not put an end to the contract of pledge, whatever might have been the plaintiff's right to maintain an action for damage sustained, if any.

SHEE, J., dissented, holding that Simpson's act in pledging the debentures *for a larger debt* than his to the plaintiff, was an abuse of the pledge and forfeited it; that is, that the pledge was thereby terminated, and the plaintiff acquired an immediate right to repossess himself.]

GURLEY *v.* ARMSTEAD.

Supreme Court of Massachusetts, January, 1889. 148 Mass. 267.

TORT for the conversion of certain articles of personal property belonging to the plaintiff. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts, which, so far as material, appears in the opinion.

DEVENS, J. The defendant, who was a job teamster, removed the goods alleged to have been by him converted from a room in the dwelling-house of one Whittier to the store of one Davis, and there delivered them to Whittier, by whose direction he had acted. Although the goods were in the house of Whittier, they were in a room hired by the plaintiff from him. The contract between them was one for rent, and not for storage, Whittier reserving no control over the room. It was, however, neither locked nor fastened, although no goods were in it except those of the plaintiff. In all that he did the defendant acted in good faith, without any intention of depriving the rightful owner of her property, and in ignorance of the fact that the plaintiff was such owner, neither asserting title in himself nor denying title to any other, nor exercising any act of ownership except by the removal above stated.

The legal possession of the goods was, under these circumstances, undoubtedly in the plaintiff, and as they were in the room hired by her, the actual possession was also hers. The apparent control of them was, however, in Whittier, as they were in his house, and he

had further the present capacity to take actual physical possession, as the room in which they were was neither locked nor fastened.

It is conceded that whoever receives goods from one in actual, although illegal, possession thereof, and restores the goods to such person, is not liable for a conversion by reason of having transported them. *Strickland v. Barrett*, 20 Pick. 415. *Leonard v. Tidd*, 3 Met. 6. And this would be so apparently, even if the goods thus received were restored to the wrongful possessor, after notice of the claim of the true owner. *Loring v. Mulcahy*, 3 Allen, 575. *Metcalf v. McLaughlin*, 122 Mass. 84.

Upon the precise question raised, we have found no direct authority, nor was any cited in the argument; but the principle on which the decisions above cited rest is not unreasonably extended when it is applied to the circumstances of the case at bar. The act of removing goods by direction of the wrongful possessor of them is an act in derogation of the title of the rightful owner; but the party doing this honestly is protected because from such actual possession he is justified in believing the possessor to be the true owner. He does no more than such possessor might himself have done by virtue of his wrongful possession.

The defendant was a job teamster, and thus in a small way a common carrier of such wares and merchandise as could appropriately be transported in his team or wagon. He exercised an employment of such a character that he could not legally refuse to transport property such as he usually carried, which was tendered to him at a suitable time and place with the offer of a reasonable compensation. If he holds himself out as a common carrier, he must exercise his calling upon proper request and under proper circumstances. *Buckland v. Adams Express Co.*, 97 Mass. 124. *Judson v. Western Railroad*, 6 Allen, 486. His means of ascertaining the true title of the freight confided to him are of necessity limited. He must judge of this as it is fairly made to appear. If Whittier had actually gone into the room, as he might readily have done, and taken physical possession of the goods, the defendant upon well established authority would have been justified in obeying the order, and transporting the goods to Whittier at another place; and he should not be the less justified where Whittier, in apparent control of the goods in his own house, and capable of immediately taking them into his actual custody by entering the room through the unlocked door, has directed the removal.

If a person standing near and in sight of a bale of goods lying on the sidewalk belonging to another, and thus in the legal possession of such other, is able at once to possess himself of it actually, although illegally, and directs a carrier to remove it and deliver it to him at another place, compliance with this order in good faith cannot be treated as a conversion; and apparent control, accompanied with the

then present capacity of investing himself with actual physical possession, must be equivalent to illegal possession in protecting a carrier who obeys the order of one having such control.

Judgment for the defendant.

ROSUM *v.* HODGES.

Supreme Court of South Dakota, November, 1890. 1 S. Dak. 308.

ACTION for conversion of certain personal property.

The facts are stated in the opinion. There was a judgment for the plaintiff, and the defendant appealed.

KELLAM, J. Respondent was the owner of certain flaxseed in his granary, on his farm in Minnehaha county. During his absence from home, and without his knowledge or consent, Gerde, his hired man, hauled to appellants' elevator, and sold and delivered to appellants, a quantity of such flax, receiving the pay therefor. Appellants bought innocently, supposing Gerde had a right so to sell. Immediately after the sale, Gerde absconded with the proceeds, with the exception of a small amount, noticed hereafter. The action was brought against appellants for the conversion of the flax. Respondent had judgment, and appellants appeal.

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The next assignment alleges error in the charge of the court upon the question of authority of Gerde to sell the flax. We do not stop now to examine this instruction in respect to the error alleged, for the reason that there is no evidence in the case tending in any degree to show authority, either express or implied, in Gerde to sell the flax. If the jury had so found under any instruction, we think it would have been the duty of the court to set such verdict aside.

The next and last assignment is that the court erred in charging the jury that no demand was necessary before bringing the action. The question as to whether, without previous demand, an action for the conversion of personal property can be maintained against an innocent purchaser of such property from one who tortiously obtained the same from the owner, has been and still is the subject of frequent and elaborate discussion in the courts. In *Stanley v. Gaylord*, 1 Cush. 536, the question was examined at great length, both upon principle and as affected by the rules applicable to and distinguishing the actions of trespass, trover and replevin, and the court concludes (Wilde, J., dissenting) that trespass may be maintained without demand. In *Hyde v. Noble*, 13 N. H. 494, it was held that the purchase of property from one who had no power to sell, when the purchaser took a delivery of it, and retained possession under the sale, was in itself a conversion by the purchaser, sufficient to enable the

owner to maintain trover against him without a previous demand. In *Trudo v. Anderson*, 10 Mich. 357, the court held that, where one's property is disposed of without authority by the person having it in charge, the owner may bring replevin therefor without a previous demand, and he may do this notwithstanding the property is in the hands of one who has bought in good faith, and without notice of the title of the real owner; and, after discussing at some length the necessity of a previous demand in such a case, the court says: "We do not think the question of intent or of good faith in a party receiving possession from a wrongful taker in such cases, and where the owner has been guilty of no wrong or negligence, can have any bearing upon the right of recovery in a civil action for the property or its value, and such is clearly the weight of authority both in England and in the United States." And this doctrine was reiterated in *Ballou v. O'Brien*, 20 Mich. 304. It is also so held in *Galvin v. Bacon*, 11 Me. 28; *Mining Co. v. Tritle*, 4 Nev. 493; *Clark v. Lewis*, 35 Ill. 417; *Shoemaker v. Simpson*, 16 Kan. 43; *Eldred v. Oconto Co.*, 33 Wis. 133; *Smith v. McLean*, 24 Iowa, 322. In an early case in New York, *Storm v. Livingston*, 6 Johns. 44, a contrary doctrine was announced, and has been adhered to in that state.¹ In *Barrett v. Warren*, 3 Hill, 348, Cowen, J., referring to the rule announced in *Storm v. Livingston*, and followed in later cases in New York, used the following significant language: "I will not, however, deny that an exception in favor of the taker, where he is a bona fide purchaser from the wrong-doer, has found its way into the books; nor that, however discordant it be with established principles, it may, at least in this state, have become too inveterate to be displaced." The rule adopted in New York seems also to have been followed in Indiana. See *Wood v. Cohen*, 6 Ind. 455, and *Conner v. Comstock*, 17 Ind. 90. In *Eldred v. Oconto Co.*, supra, the supreme court of Wisconsin, after noticing the fact that the New York courts have uniformly held as above indicated, says: "But we find a decided weight of authority the other way, and we are satisfied that the New York rule is not sound in principle." Upon principle, it is not easy to give a satisfactory reason why the true owner, who has been guilty of no wrong or negligence, should be prejudiced by a transaction between the wrongful taker of his property and a third person, or how such a transaction can impose upon him a new obligation. Having been guilty of no act impairing, or in any manner qualifying, either his right of property or his right of immediate possession, he may assert such right whenever and wherever he finds his property. The wrongful taker had no rightful possession against the true owner, and he could convey none to another. In this case the respondent was deprived of the possession of his property by the tortious, if not felonious, act of Gerde, and appellants' claim to the same comes

¹ But cf. *Pease v. Smith*, 61 N. Y. 477.

through such tortious taking. The taking did not deprive respondent of his right in and to the property so taken, neither could its sale by the wrongful taker. It remained the absolute property of respondent, as much after as before the sale. The possession of appellants being wrongful as against respondent, the true owner, no previous demand was necessary before bringing suit for the property or its value. Referring to the apparent equity of the New York doctrine as applied to cases where the purchaser was clearly innocent, the supreme court of Michigan says, in *Trudo v. Anderson*, *supra*: "The principle upon which the New York rule rests might properly have some weight with the court upon a question of costs where these are discretionary, or might justify the legislature in refusing costs to the plaintiff where a previous demand could have been made without serious risk or inconvenience, and the suit has been brought without such demand; but we think the principle of the rule cannot properly be extended to the right of action." Upon the case presented by the evidence, the instruction complained of was correct. The judgment of the district court is affirmed. All the judges concurring.

Affirmed.

CASTLE *v.* CORN EXCHANGE BANK.

Supreme Court of New York, January, 1894. 75 Hun. 90.

TROVER for the conversion of a bill of exchange drawn by the Farmers' National Bank of Lancaster, Penn., on the First National Bank of New York, and payable to the order of the cashier of the defendant bank. The plaintiff sues as the assignee of the rights of one Cameron.

One Mrs. Melson drew a check on the Farmers' Bank payable to the order of Cameron; Cameron indorsed the check for collection to Harrison's Bank, which indorsed it "for collection" to the Corn Exchange Bank. The latter bank sent the check to the Farmers' Bank, on which it was drawn, for collection; and in payment, the Farmers' Bank drew the draft, which is the subject of this suit, upon the First National Bank, payable to the order of the defendant's cashier, and mailed it to the defendant, by whom it was duly received.

Subsequently, Cameron, having learned of the failure of Harrison's Bank, telegraphed Mrs. Melson to stop payment on it. Mrs. Melson went to the Farmers' Bank to stop payment of the check; and on learning that the check had been paid by the draft, telegraphed the defendant bank to hold the money on the draft.

To this telegram, the defendant replied, saying that it was the

owner of the draft. Thereupon the Farmers' Bank telegraphed the defendant, asking it to hold the draft. The defendant replied that it could not, that the check which the draft paid was its property.

The Farmers' Bank then countermanded payment of the draft by the First National Bank, the drawee. The Corn Exchange Bank then sued the Farmers' Bank, upon the draft, attaching money in the First National Bank belonging to the Farmers' Bank, and the money so attached was paid over under the attachment to the sheriff, who took the money and absconded.

At the trial a verdict was directed for the defendant, and the plaintiff's motion to set aside the verdict and for a new trial was denied, and the plaintiff appealed.

O'BRIEN, J. . . . Here the evidence showed that the plaintiff's assignor delivered the check, which was subsequently cancelled, and for which the draft involved in this action was substituted, for collection. And as no evidence was offered on the part of the defendant tending to show that it parted with any value upon the faith of the receipt of such draft, the question of its ownership as having received the same for value does not arise. In determining whether the direction was right, therefore, we can assume that the law as laid down in the case of *McBride v. Farmers' Bank of Salem, Ohio*, 26 N. Y. 450, which has been cited with approval in numerous cases, is authority for the proposition that a bank receiving from another, notes, checks or drafts for collection, obtains no better title to them or the proceeds than the remitting bank had, unless it becomes a purchaser for value without notice of any defect of title. As the defendant does not claim to stand in the position of such holder for value, it would follow that, unless there is some obstacle to the maintenance of the action, the plaintiff could recover.

There are three grounds relied upon to defeat such a recovery, only one of which we think need be considered.

The facts show that the defendant came lawfully into possession of the draft, charged with the duty, as between it and the party from whom it was received, of collecting it. The original check received for which the draft was substituted, as said by Mr. Justice Follett, in *C. E. Bank v. F. N. Bank*, supra,¹ "was no longer a valid contract. The liability of the drawer and indorsers thereon was ended, and could never be restored. The Lancaster bank² had legally and in good faith discharged its duty to the drawer, the indorsers and the holder of the check, and the Corn Exchange Bank had accepted of the draft of the Lancaster bank in discharge of the liability of the drawer and indorsers."

Therefore, the bank having come rightfully in possession of the draft, and having rightfully proceeded to enforce its collection, the

¹ 118 N. Y. 445.

² That is, the Farmers' Bank.

question presented is, whether the plaintiff can maintain this action without showing that he or his assignor, claiming to own the draft or the proceeds, made a demand before suit brought.

The plaintiff appears to have been impressed by the importance of a demand, because in the complaint, after reciting the facts, it is alleged: "That on said day, and before such presentation of said draft, all authority of defendant to collect the same was duly countermanded and revoked, and said Cameron thereupon duly demanded that defendant at once deliver to him said draft theretofore indorsed in blank as aforesaid."

We have examined the record and can find no proof in support of this portion of the complaint. There is no testimony of the plaintiff's assignor, nor of anyone else on his behalf, showing a demand of the draft.

In view of the authorities, we must regard it as settled law that one who comes lawfully in possession of property is not liable for conversion until after demand and refusal. *Gillet v. Roberts*, 57 N. Y. 28; 2 Bouv. Inst. ss. 3530, 3531, 3528. In the last section (3528) it is said: "When the conversion is direct, as by an illegal taking under a wrongful assumption of property, or a misuse of the chattel, we have seen that the conversion is complete without a demand; but to maintain trover for an indirect conversion, a demand is in general indispensable, because the defendant being lawfully in possession of the goods, there is no conversion before he assumes a property in them." To the same effect is the American and English Encyclopædia of Law, Vol. 4, title "Conversion," p. 115, which not only confirms the rule as stated by Bouvier, but cites the case of *Storm v. Livingston*, 6 Johns. 44, as authority for its statement that the demand must be made before the action is brought.

The two cases relied upon by the plaintiff to show that no demand is necessary seem to us to have been ill chosen. One, that of *McBride v. Farmers' Bank*, from which we have quoted supra, is authority for the position that one to whom the right of action was assigned could maintain the action without demand; but this was placed expressly upon the ground that, the assignor having demanded the note before maturity and the proceeds afterwards, the cause of action was thus complete and no new demand necessary. *McKee v. Judd*, 12 N. Y. 622, which is the other case cited by appellant, was an action for the wrongful taking and conversion of personal property, and it was therein held that in such an action no demand or refusal was necessary to maintain the action.

Another and a stronger position taken by appellant to obviate the necessity of a demand is, that though the original possession by defendant was lawful and a demand to place it in the wrong would have been necessary, yet, it appearing that the defendant assumed ownership and converted the draft and proceeds to its own use, this

was such an unwarranted and unjustifiable position as to do away with the necessity of a demand.

While it may be stated as a general proposition that where one comes lawfully in possession of property, in order that an action may lie against him for conversion, a demand is necessary, and also that where the original taking or possession was wrongful, no demand is necessary, there is still authority for the further position that though one may come lawfully into possession of property, if, after notice of the rights of the true owner and regardless thereof, dominion and ownership is asserted, then demand is not necessary. Or, as held in *Boyce v. Brockway*, 31 N. Y. 490: "Where the assumption of dominion over property is in hostility to the rights of the true owner, such assumption amounts in law to a conversion. To maintain an action for the wrongful conversion of property, it is enough that the rightful owner has been deprived of it by the unauthorized act of another assuming dominion over it."

The principle underlying these different instances of when conversion will lie is the same in all, requiring that before an action for conversion can be maintained the person sought to be held shall, either by his own act or the act of the owner of the property, be placed in the wrong. Applying this principle, we think that the evidence in this case is clearly insufficient to justify the inference that the defendant, in the absence of any demand, was placed in the wrong. In other words, we do not think that the testimony tended to prove *that the defendant was guilty of conversion*.

The only evidence that could be tortured into a demand, or assigned as supporting the theory of a conversion, is a telegraphic correspondence passing between defendant and the maker of the check and the Farmers' National Bank. The first of these telegrams sent by the maker of the check simply requested the defendant to hold the money on the draft in suit, stating that the bank to which it had been delivered for collection had suspended. In this we find no demand for the draft, either on her behalf or on that of any other person. The other dispatch was sent by the Farmers' National Bank and reads: "Can you hold our draft on 1st N. Y. sent yesterday? The drawer and indorser would like to have the money held for their account." This but asks the defendant to hold the draft, and contains in addition a statement that the drawer and indorser would like to have the money held for their account. But here, again, no demand for the draft was made, nor is there any reference to the ownership claimed by plaintiff's assignor.

We think it appears, therefore, that no demand was ever made by plaintiff's assignor, or by any person authorized by her to make such demand. It is true that the defendant, in answer to one of the telegrams, stated that it claimed the draft as its own. This cannot be taken as a refusal after demand by the owner, when demand was

never made, because as against both the persons sending the draft it was the duty of the defendant, a duty which he owed to its principal, who had sent the original check to it, to enforce the payment of the draft which was substituted therefor, and it can hardly be claimed that asserting a claim as against the drawers, or proceeding to collect the draft, which it was its duty to do, was conclusive as between it and the true owner of a conversion of the draft or its proceeds.

To constitute conversion there must be a claim of ownership asserted against the true owner, or in a case where the property has come lawfully into the possession of another, there must be a demand for its return by the owner or his authorized agent. A demand by a third person, who has no relation to, or does not stand in privity with, the owner, is not sufficient.

In our opinion, as the defendant was never placed in the wrong, and never had any demand of it by the rightful owner, the action for conversion would not lie, and the evidence, as it stood at the close of the trial, justified the direction of a verdict in defendant's favor, if, upon no other ground, upon this ground alone.

We think that the direction was right, and that the judgment appealed from should be affirmed, with costs.

VAN BRUNT, P. J., and PARKER, J., concurred.

Judgment affirmed, with costs.

SINGER MANUFACTURING COMPANY v. KING.

Supreme Court of Rhode Island, June, 1884. 14 R. I. 511.

THE case is stated in the opinion.

DURFEE, C. J. This is trover for the conversion of a sewing machine belonging to the plaintiff company. The case was tried in the Court of Common Pleas and comes here on exceptions. The testimony given at the trial for the plaintiff went to show that the machine was demanded of the defendant by direction of Charles H. Harris, agent for the plaintiff, and that the defendant, who was agent for the American Sewing Machine Company, though he had the machine, refused to deliver it until storage was paid for it or until another machine belonging to the American Sewing Machine Company which the plaintiff had was returned. The defendant testified that the machine was brought to him by one Conner, an employee of the American Sewing Machine Company; that he was instructed to hold it for storage, and that, though he did not announce it when the demand was made, the plaintiff knew that he was agent for the American Sewing Machine Company. It further appeared

that the machine had been leased to a Mrs. Lynch by the plaintiff Company; that Conner had received it from her, leaving a machine of the American Company in place of it; that he had carried it to Harris, and that Harris refused to receive it, saying that his Company had no machines out which were then due; that he then carried it to the American Sewing Machine Company and told Harris that he had done it. Harris testified in reply that he did not see the machine when Conner brought it and that he had not authorized any one to store it with the American Company.

1. The court instructed the jury that if the defendant, when demand was made upon him, was the agent of the American Sewing Machine Company, and was holding the machine under their orders and not for himself or under his own control, then the defendant would not be guilty. The plaintiff excepted.

2. The plaintiff asked the court to instruct the jury that the defendant would be guilty unless he told the plaintiff when the demand was made that he was holding the machine as servant of the American Sewing Machine Company. The court refused so to instruct the jury, but did instruct them that the defendant's omission to give the information would not constitute a conversion, but would be evidence for them to consider in determining the question as to whether he was holding the machine as agent or not. The plaintiff excepted. The question is, were the instructions and the refusal correct.

Ordinarily, when one person has the chattel of another, it is his duty to deliver it to the owner or his agent on demand, and if he refuses to do so, his refusal is evidence of a conversion. It is, however, only *prima facie* evidence and may be explained. *Magee v. Scott*, 9 Cush. 148; *Robinson v. Burleigh*, 5 N. H. 225; *Dictus v. Fuss*, 8 Md. 148; *Green v. Dunn*, 3 Camp. 215; *Solomons v. Dawes*, 1 Esp. 83. Thus it is no conversion for the bailee of a chattel, who has received it in good faith from some person other than the owner, to refuse to deliver it to the owner making demand for it until he has had time to satisfy himself in regard to the ownership. *Carroll v. Mix*, 51 Barb. S. C. 212; *Lee v. Bayes*, 18 C. B. 599, 607; *Sheridan v. The New Quay Co.*, 4 C. B. N. S. 618; *Coles v. Wright*, 4 Taunt. 198. In the case of a servant who has received the chattel from his master, it has been held that he ought not to give it up without first consulting his master in regard to it. *Mires v. Solebay*, 2 Mod. 242, 245; *Alexander v. Southey*, 5 B. & A. 247; *Berry v. Vantries*, 12 Serg. & R. 89. But if, after having had an opportunity to confer with his master, he relies on his master's title and absolutely refuses to comply with the demand, he will be liable for a conversion. *Lee v. Robinson*, 25 L. J. C. P. 249; 18 C. B. 599; 1 Addison on Torts, s. 475; *Greenway v. Fisher*, 1 Car. & P. 190; *Stephens v. Elwell*, 4 M. & S. 259; *Perkins v. Smith*, 1 Wils. 328; *Gage v. Whittier*, 17

N. H. 312. The mere fact that he refuses for the benefit of his principal will not protect him. *Kimball v. Billings*, 55 Me. 147.

In the case at bar the defence is that the defendant, acting as agent of the American Sewing Machine Company, refused to deliver the machine in obedience to instructions not to deliver it until storage was paid for it. The defendant did not refuse for the purpose of consulting his principal, but it would seem that he had received his instructions before the demand in anticipation of it. He was not a mere servant but an agent, and he may have been, for anything that appears, a general agent. The machine came to him, not from his master or principal, as in *Mires v. Colebay*; but from a fellow employee, and he may have known, indeed the evidence carries the impression that he did know, all the circumstances in regard to it, and nevertheless co-operated with his principal in withholding it from its owner by insisting on a condition which neither he nor his principal had any right to impose. If such was the fact, we think he was guilty; and yet, if such was the fact, the jury might have found him not guilty under the instructions given by the court which are the ground of the first exception. The first exception must therefore be sustained. We do not find any error in the instructions which are the ground of the second exception, except in so far as they involve a repetition of instructions before given. The case will be remitted for new trial.

Exceptions sustained.

CHAPTER XV.

VIOLATION OF RIGHTS OF SUPPORT.

THURSTON *v.* HANCOCK.

Supreme Court of Massachusetts, March, 1815. 12 Mass. 220.

THIS was an action of the case, in which the plaintiff declares that long before the several grievances afterwards mentioned, and at the several times of committing the same, he was, and thence hitherto hath been, and still is, seised in fee of a certain messuage or dwelling-house and land, with the appurtenances, in Boston, which were in his possession and occupancy, and he had, and still ought to have, the full, safe, and secure use and enjoyment of the same; nevertheless, the defendants, well knowing the premises, but maliciously contriving and intending to hurt the plaintiff in this behalf, and to deprive him of the use and benefit of the said dwelling-house, on, &c., and on divers other days and times between that day and the day of suing his original writ in this behalf, at Boston aforesaid, wrongfully and injuriously took, dug, and carried away the earth, ground, and soil from the land next adjoining the plaintiff's said dwelling-house and land, to a great depth, that is to say, to the depth of sixty feet below the ancient surface of the said next adjoining land, and below the foundation of the plaintiff's said dwelling-house, and so near and so close to the said dwelling-house and land that the ground, earth, and soil of the plaintiff was undermined, and hath fallen away from around his said dwelling-house, and from his land on which the same are situated; so that the cellar walls thereof have been left naked and exposed; by reason whereof the plaintiff hath been, and still is, greatly prejudiced and injured in his aforesaid estate, of and in the said dwelling-house and land, and the same is become of no value to him, and the said house hath been, and still is, in great danger of being thereby undermined and of falling down, and hath been thereby rendered wholly unsafe and insecure to dwell in, and of no use or benefit to the plaintiff, and by reason of the premises he hath been obliged to quit said house and to leave the same empty and untenanted, and been put to great trouble and expense, and hath been, and still is, deprived of all benefit, use, and enjoyment thereof, by means and on account of the premises. To his damage \$20,000.

A trial was had upon the issue of not guilty, November term, 1813, and a verdict found for the defendants was to be set aside, and a new

trial granted, if, in the opinion of the court, the plaintiff was entitled to maintain his action upon the following state of facts reported by the judge who sat in the trial, namely: that the plaintiff, in the year 1802, purchased a parcel of land upon Beacon Hill, so called, in Boston, bounded westwardly on land belonging to the town of Boston, on the said hill, eastwardly on Bowdoin Street, so called, and northwardly and southwardly on land of D. D. Rogers, Esq.; that afterwards, in the year 1804, the plaintiff erected a valuable brick dwelling-house thereon, which stood at the distance of forty feet from the northern and southern bounds of his land, the back side of the said house being about two feet from the western bounds of said land; that the foundation of said house was placed about fifteen feet below the ancient surface of the land; that the plaintiff, with his family, occupied the said house and land from the month of December, 1804, until they were obliged to remove therefrom, as hereafter mentioned; that the defendants commenced digging and removing the gravel from the side of the said hill in the year 1811; that on the 27th of July, 1811, the plaintiff gave them written notice that his house was endangered thereby; that the defendants, notwithstanding, continued to dig and carry away the earth and gravel from the hill, until the commencement of this action; that the only land belonging to the defendants, which adjoined to the said house and land of the plaintiff, was purchased by them of the town of Boston, and conveyed by deed dated the 6th of August, 1811; that the land thus bought by the defendants consisted of a lot about one hundred feet square, upon the top of said Beacon Hill, and a right in a highway thirty feet wide, leading to it from Summer Street; that this lot and highway were laid out by said town more than sixty years since, for the purpose of erecting a beacon, and have never been used for any other purpose, except the erection of a monument; that the town derived its title to said land from long-continued possession for the purpose aforesaid; that all these facts were known to the defendants before they purchased said land of the town; that this land adjoined the plaintiff's house and land on the western side, and, at the time of suing out the plaintiff's writ, the defendants' digging and removal of the earth as aforesaid had approached, on the surface, within five or six feet of the plaintiff's house on the western side thereof, and in some places the earth had, by reason of said digging and removal, fallen from the walls thereof; that the defendants had dug and carried away the earth near the northwestwardly corner of said house to the depth of forty-five feet, and on the western side thereof to the depth of thirty feet, below the natural surface of their own, as well as of the plaintiff's land; that the earth dug and removed by the defendants as aforesaid was upon and from their said land next adjoining the plaintiff's land; that, by reason of the digging and removing of the earth as aforesaid, to the depth aforesaid, below the ancient surface of the

earth, a part of the plaintiff's earth and soil, on the surface of his said land, had fallen away and slidden upon the defendants' land; and the foundation of the plaintiff's house was rendered insecure, and it became, and was, at the time of commencing this action, unsafe and dangerous to dwell in said house; and the plaintiff was obliged to quit and abandon the same, previous to his commencing this action, and afterwards to take it down in order to save the materials thereof.

PARKER, C. J. The facts agreed present a case of great misfortune and loss, and one which has induced us to look very minutely into the authorities, to see if any remedy exists in law against those who have been the immediate actors in what has occasioned the loss; but, after all the researches we have been able to make, we cannot satisfy ourselves that the facts reported will maintain this action.

The plaintiff purchased his land in the year 1802, on the summit of Beacon Hill, which has a rapid declivity on all sides. In 1804, he erected a brick dwelling-house and out-houses on this lot, and laid his foundation, on the western side, within two feet of his boundary line. The inhabitants of the town of Boston were at that time the owners, either by original title or by an uninterrupted possession for more than sixty years, of the land on the hill lying westwardly of the lot purchased by the plaintiff. On the 6th of August, 1811, the defendants purchased of the town the land situated westwardly of the said lot owned by the plaintiff; and, in the same year, commenced levelling the hill, by digging and carrying away the gravel; they not actually digging up to the line of division between them and the plaintiff, but keeping five or six feet therefrom. Nevertheless, by reason of the hill, the earth fell away, so as in some places to leave the plaintiff's foundation wall bare, and so to endanger the falling of his house as to make it prudent and necessary, in the opinion of skilful persons, for the safety of the lives of himself and his family, to remove from the house; and, in order to save the materials, to take down the house, and to rebuild it on a safer foundation. The defendants were notified of the probable consequences of thus digging by the plaintiff, and were warned that they would be called upon for damages, in case of any loss.

The manner in which the town of Boston acquired a title to the land, or to the particular use to which it was appropriated, can have no influence upon the question, as the fee was in the town, without any restriction as to the manner in which the land should be used or occupied.

It is a common principle of the civil and of the common law, that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it.

The law, founded upon principles of reason and common utility, has admitted a qualification to this dominion, restricting the pro-

prietor so to use his own as not to injure the property or impair any actual existing rights of another. *Sic utere tuo ut alienum non lædas*. Thus, no man, having land adjoining his neighbor's which has been long built upon, shall erect a building in such manner as to interrupt the light or the air of his neighbor's house, or expose it to injury from the weather or to the unwholesome smells.

But this subjection of the use of a man's own property to the convenience of his neighbor is founded upon a supposed pre-existing right in his neighbor to have and enjoy the privilege which by such act is impaired. Therefore it is, that, by the ancient common law, no man could maintain an action against the owner of an adjoining tract of land, for interrupting the passage of the light or the air to a tenement unless the tenement thus affected was ancient, so that the plaintiff could prescribe for the privilege of which he had been deprived, upon the common notion of prescription, that there was formerly a grant of the privilege, which grant has been lost by lapse of time, although the enjoyment of it has continued.

Now, in such case of a grant presumed, it shall for the purposes of justice be further presumed that it was from the ancestor of the man interrupting the privilege, or from those whose estate he has; so as to control him in the use of his own property, in any manner that shall interfere with or defeat an ancient grant thus supposed to have been made. This is the only way of accounting for the common-law principle which gives one neighbor an action against another, for making the same use of his property which he has made of his own. And it is a reasonable principle; for it would be exceedingly unjust that successive purchasers or inheritors of an estate for the space of sixty years, with certain valuable privileges attached to it, should be liable to be disturbed by the representatives or successors of those who originally granted, or consented to, or acquiesced in, the use of the privilege.

It is true, that, of late years, the courts in England have sustained actions for the obstruction of such privileges of much shorter duration than sixty years. But the same principle is preserved of the presumption of a grant. And, indeed, the modern doctrine, with respect to easements and privileges, is but a necessary consequence of late decisions, that grants and title-deeds may be presumed to have been made, although the title or privilege claimed under them is of a much later date than the ancient time of prescription.

The plaintiff cannot pretend to found his action upon this principle; for he first became proprietor of the land in 1802, and built his house in 1804, ten years before the commencement of his suit. So that, if the presumption of a grant were not defeated by showing the commencement of his title to be so recent, yet there is no case, where less than twenty years has entitled a building to the qualities of an ancient building, so as to give the owner a right to the continued

use of privileges, the full enjoyment of which necessarily trenches upon his neighbor's right to use his own property in the way he shall deem most to his advantage. A man who purchases a house, or succeeds to one, which has the marks of antiquity about it, may well suppose that all its privileges of right appertain to the house; and, indeed, they could not have remained so long, without the culpable negligence or friendly acquiescence of those who might originally have had a right to hinder or obstruct them. But a man who himself builds a house adjoining his neighbor's land, ought to foresee the probable use by his neighbor of the adjoining land, and, by convention with his neighbor, or by a different arrangement of his house, secure himself against future interruption and inconvenience.

This seems to be the result of the cases anciently settled in England, upon the substance of nuisance or interruption of privileges and easements; and it seems to be as much the dictate of common sense and sound reason as of legal authority.

The decisions cited by the counsel for the plaintiff, 1 Domat, 309, 408; Fitz. N. B. 183; 9 Co. 59; Palmer, 536; 1 Roll. Abr. 140; *ib.* 430; *Slingsby v. Barnard*, 1 Roll. Rep. 88; 2 Roll. Abr. 565; 2 Saund. 697; Co. Lit. 56 *b*; 1 Burr. 337; 6 D. & E. 411; 7 East, 368; 1 B. & P. 405; 3 Wils. 461, in support of this action, generally go to establish only the general principle, that a remedy lies for one who is injured consequentially by the acts of his neighbor done on his own property. The civil-law doctrine cited from Domat will be found, upon examination, to go no further than the common law upon the subject. For, although it is there laid down that new works on a man's ground are prohibited, provided they are hurtful to others who have a right to hinder them, and that the person erecting them shall restore things to their former state, and repair the damages, from whence, probably, the common-law remedy of abating a nuisance as well as recovery of damages, yet this is subsequently explained and qualified in another part of the same chapter, where it is said, that, if a man does what he has a right to do upon his own land, without trespassing upon any law, custom, title, or possession, he is not liable to damage for injurious consequences, unless he does it, not for his own advantage, but maliciously; and the damages shall be considered as casualties for which he is not answerable.

The common law has adopted the same principle, considering the actual enjoyment of an easement for a long course of years as establishing a right which cannot with impunity be impaired by him who is the owner of the land adjoining.

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In Rolle's Abridgment, 565, A, seised in fee of copyhold estate, next adjoining land of B, erects a new house upon his copyhold land, and a part is built upon the confines next adjoining the land of B,

and B afterwards digs his land so near the house of A, but on no part of his land, that the foundation of the house, and even the house itself, fall; yet no action lies for A against B, because it was the folly of A that he built his house so near to the land of B. For by his own act he shall not hinder B from the best use of his own land that he can. And, after verdict, judgment was arrested. The reporter adds, however, that it seems that a man, who has land next adjoining my land, cannot dig his land so near mine as to cause mine to slide into the pit; and, if an action be brought for this, it will lie.

Although, at first view, the opinion of Rolfe seems to be at variance with the decision which he has stated, yet they are easily reconciled with sound principles. A man in digging upon his own land is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor, if he digs too near his line; and if he disturbs the natural state of the soil, he shall answer in damages; but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon or near the line by his neighbor. For, in so placing the house, the neighbor was in fault, and ought to have taken better care of his interest.

If this be the law, the case before us is settled by it; and we have not been able to discover that the doctrine has ever been overruled, nor to discern any good reason why it should be.

The plaintiff purchased his land in 1802. At that time the inhabitants of Boston were in possession and the owners of the adjoining land now owned by the defendants. The plaintiff built his house within two feet of the western line of the lot, knowing that the town, or those who should hold under it, had a right to build equally near to the line, or to dig down into the soil for any other lawful purpose. He knew also the shape and nature of the ground, and that it was impossible to dig there without causing excavations. He built at his peril; for it was not possible for him, merely by building upon his own ground, to deprive the other party of such use of his as he should deem most advantageous. There was no right acquired by his ten years' occupation, to keep his neighbor at a convenient distance from him. He could not have maintained an action for obstructing the light or air; because he should have known, that, in the course of improvements on the adjoining land, the light and air might be obstructed. It is, in fact, *damnum absque injuriâ*.

By the authority above cited, however, it would appear that for the loss of, or injury to, the soil merely, his action may be maintained. The defendants should have anticipated the consequences of digging so near the line; and they are answerable for the direct consequential damage to the plaintiff, although not for the adventitious damage arising from his putting his house in a dangerous position.

HUMPHRIES v. BROGDEN.

Queen's Bench of England, Michaelmas Term, 1850. 12 Q. B. 739.

THIS was an action against the Durham County Coal Company, sued in the name of their secretary. On the trial before Coleridge, J., at the Durham Spring Assizes, 1850, the jury, in answer to questions put by the learned judge, found the facts specially. His lordship then directed a verdict for the plaintiff, giving the defendants leave to move to enter a verdict for them upon the findings of the jury. Rule nisi. *Cur. adv. vult.*

LORD CAMPBELL, C. J. This is an action on the case. The declaration alleges that the plaintiff was possessed of divers closes of pasture and arable land, situate, &c., yet that the company, so wrongfully, carelessly, negligently, and improperly, and without leaving any proper and sufficient pillars or supports in that behalf, and contrary to the custom and course of practice of mining used and approved of in the country where the mines thereafter mentioned are situate, worked certain coal-mines under and contiguous to the said closes, and dug for and got and moved the coals, minerals, earth, and soil of and in the said mines, that, by reason thereof, the soil and surface of the said closes sank in, cracked, swagged, and gave way; and thereby, &c. The only material plea was not guilty.

The cause coming on to be tried before my brother Coleridge at the last spring assizes for the county of Durham, it appeared that the plaintiff was possessed of the closes described in the declaration, and that the Durham County Coal Company (who may sue and be sued by their secretary) were lessees, under the Bishop of Durham, of the coal-mines under them; but there was no other evidence whatever as to the tenure or the title either of the surface or of the minerals. It appeared that the company had taken the coals under the plaintiff's closes, without leaving any sufficient pillars to support the surface, whereby the closes had swagged and sunk, and had been considerably injured; but that, supposing the surface and the minerals to have belonged to the same person, these operations had not been conducted carelessly, or negligently, or contrary to the custom of the country. The jury found that the company had worked carefully and according to the custom of the country, but without leaving sufficient pillars or supports; and a verdict was entered for the plaintiff for £110 damages, with leave to move to enter a verdict for the defendant if the court should be of opinion that, under these circumstances, the action was not maintainable.

The case was very learnedly and ably argued before us in Easter and Trinity terms last. On account of the great importance of the question, we have taken time to consider of our judgment.

For the defendant it was contended that, after the special finding of the jury, the declaration is defective in not alleging that the plaintiff was entitled to have his closes supported by the subjacent strata. But we are of opinion that such an allegation is unnecessary to raise the question in this action, whether the company, although they did not work the mines negligently or contrary to the custom of the country, were bound to leave props to support the surface. If the easement which the plaintiff claims exists, it does not arise from any special grant or reservation, but is of common right, created by the law, so that we are bound to take notice of its existence. In pleading it is enough to state the facts from which a right or a duty arises. The carefully prepared declaration in *Littledale v. Lord Lonsdale*, H. Bl. 267, for disturbing the right of the owner of the surface of lands to the support of the mineral strata belonging to another, contains no express allegation of the right; and, if the omission had been considered important, it probably would have been relied upon, rather than the objection that a peer of Parliament was not liable to be sued in the Court of King's Bench by bill.

We have, therefore, to consider, whether, when the surface of land (by which is here meant the soil lying over the minerals) belongs to one man, and the minerals belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals may remove them without leaving support sufficient to maintain the surface in its natural state. This case is entirely relieved from the consideration how far the rights and liabilities of the owners of adjoining tenements are affected by the erection of buildings; for the plaintiff claims no greater degree of support for his lands than they must have required and enjoyed since the globe subsisted in its present form.

Where portions of the freehold, lying one over another perpendicularly, belong to different individuals, and constitute (as it were) separate closes, the degree of support to which the upper is entitled from the lower has as yet by no means been distinctly defined. But, in the case of adjoining closes which belong respectively to different persons from the surface to the centre of the earth, the law of England has long settled the degree of lateral support which each may claim from the other; and the principle upon which this rests may guide us to a safe solution of the question now before us.

In 2 Rolle's Abridgment, 564, tit. Trespass (1), pl. 1, it is said: "If A, seised in fee of copyhold land next adjoining land of B, erect a new house on his copyhold land" (I may remark that the circumstance of A's land being copyhold is wholly immaterial), "and part of the house is erected on the confines of his land next adjoining the land of B, if B afterwards digs his land near to the foundation of the house of A, but not touching the land of A, whereby the foundation of the house and the house itself fall into the pit, still no action lies

at the suit of A against B, because this was the fault of A himself that he built his house so near to the land of B, for he could not by his act hinder B from making the most profitable use of B's own land. Easter Term, 15 Car. B. R., *Wilde v. Minsterley*. But semble that a man who has land next adjoining to my land cannot dig his land so near to my land that thereby my land shall fall into his pit; and for this, if an action were brought, it would lie." This doctrine is recognized by Lord C. B. Comyns, Com. Dig., Action upon the Case for a Nuisance (A); by Lord Tenterden, in *Wyatt v. Harrison*, 3 B. & Ad. 871, 876; and by other eminent judges. It stands on natural justice, and is essential to the protection and enjoyment of property in the soil. Although it places a restraint on what a man may do with his own property, it is in accordance with the precept, *sic utere tuo ut alienum non lædas*. As is well observed by a modern writer: "If the neighboring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone." Gale on Easements, p. 216.

This right to lateral support from adjoining soil is not, like the support of one building upon another, supposed to be gained by a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed as much as after the expiration of twenty years, or any longer period. *Pari ratione*, where there are separate freeholds from the surface of the land and the minerals belonging to different owners, we are of opinion that the owner of the surface, while unincumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata. Those strata may, of course, be removed by the owner of them, so that a sufficient support for the surface is left; but, if the surface subsides, and is injured by the removal of these strata, although, on the supposition that the surface and the minerals belong to the same owner, the operation may not have been conducted negligently nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. Unless the surface close be entitled to this support from the close underneath, corresponding to the lateral support to which it is entitled from the adjoining surface close, it cannot be securely enjoyed as property; and under certain circumstances, as where the mineral strata approach the surface and are of great thickness, it might be entirely destroyed. We likewise think that the rule giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation, or covenant, must be laid down generally without reference to the nature of the strata, or the difficulty of propping up the surface, or the compara-

tive value of the surface and the minerals. We are not aware of any principle upon which qualifications could be added to the rule; and the attempt to introduce them would lead to uncertainty and litigation. Greater inconvenience cannot arise from this rule in any case than that which may be experienced where the surface belongs to one owner and the minerals to another, who cannot take any portion of them without the consent of the owner of the surface. In such cases a hope of reciprocal advantage will bring about a compromise to the parties and to the public.

Something has been said of a right to a reasonable support for the surface; but we cannot measure out degrees to which the right may extend; and the only reasonable support is that which will protect the surface from subsidence, and keep it securely at its ancient and natural level.

The defendant's counsel have argued that the analogy as to the support to which one superficial close is entitled from the adjoining superficial close cannot apply where the surface and the minerals are separate tenements, belonging to different owners, because there must have been unity of title of the surface and the minerals, and the rights of the parties must depend upon the contents of the deeds by which they were severed. But, in contemplation of law, all property in land having been in the Crown, it is easy to conceive that, at the same time, the original grant of the surface was made to one, and the minerals under it to another, without any express grant or reservation of any easement. Suppose (what has generally been the fact) that there has been in a subject unity of title from the surface to the centre; if the surface and the minerals are vested in different owners without any deeds appearing to regulate their respective rights, we see no difficulty in presuming that the severance took place in a manner which would confer upon the owner of the surface a right to the support of the minerals. If the owner of the entirety is supposed to have alienated the surface, reserving the minerals, he cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all the minerals without leaving a support for the surface; and, if he is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface by the minerals which it had ever before enjoyed. Perhaps it may be said that, if the grantor of the minerals, reserving the surface, seeks to limit the right of the grantee to remove them, he is acting in derogation of his grant, and is seeking to hinder the grantee from doing what he likes with his own: but, generally speaking, mines may be profitably worked, leaving a support to the surface by pillars or ribs of the minerals, although not so profitably as if the whole of the minerals be removed; and a man must so use his own as not to injure his neighbor.

The books of reports abound with decisions restraining a man's

act upon and with his own property, where the necessary or probable consequence of such acts is to do damage to others. The case of common occurrence nearest to the present is, where the upper story of a house belongs to one man, and the lower to another. The owner of the upper story, without any express grant, or enjoyment for any given time, has a right to the support of the lower story. If this arises (as has been said) from an implied grant or covenant, why is not a similar grant or covenant to be implied in favor of the owner of the surface of land against the owner of the minerals? If the owner of an entire house, conveying away the lower story only, is, without any express reservation, entitled to the support of the lower story for the benefit of the upper story, why should not an owner of land, who conveys away the minerals only, be entitled to the support of the minerals for the benefit of the surface?

I will now refer, in chronological order, to the cases which were cited in the argument; and I think that none of them will be found in any degree to impugn the doctrine on which our decision rests.

In *Bateson v. Green*, 5 T. R. 411, Buller, J., says: "Where there are two distinct rights, claimed by different parties, which encroach on each other in the enjoyment of them, the question is, Which of the two rights is subservient to the other?" And it was held that the lord may dig clay-pits on a common, or empower others to do so, without leaving sufficient herbage for the commoners, if such right can be proved to have been always exercised by the lord. So, here, the right of the owner of the minerals to remove them may be subservient to the right of the owner of the surface to have it supported by them.

Peyton v. The Mayor, &c., of London, 9 B. & C. 725, was cited to show the necessity for introducing into the declaration an averment that the plaintiff was entitled to the easement or right which is the foundation of the action: but the easement there claimed was a right of support of one building upon another, which could arise only from a grant, actual or implied; and there Lord Tenterden says: "The declaration in this case does not allege as a fact that the plaintiffs were entitled to have their house supported by the defendants' house, nor does it in our opinion contain any allegation from which a title to such support can be inferred as a matter of law." In the case at bar, we are of opinion that the declaration alleges facts from which the law infers the right of support which the plaintiff claims.

Wyatt v. Harrison, 3 B. & Ad. 871, decided that the owner of a house, recently erected on the extremity of his land, could not maintain an action against the owner of the adjoining land for digging in his own land so near to the plaintiff's house that the house fell down; but the reason given is, that the plaintiff could not, by putting an additional weight upon this land, and so increasing the lateral pressure upon the defendant's land, render unlawful any operation in the defendant's land which before would have caused no damage; and the

court intimated an opinion that the action would have been maintainable, not only if the defendant's digging would have made the plaintiff's land crumble down unloaded by any building, but even if the house had stood twenty years. Where a house has been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house. *Stansell v. Jollord*, 1 Selw. Ni. Pri. 457 (11th ed.), and *Hide v. Thornborough*, 2 Carr. & Kir. 250. Although there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favors the preservation of enjoyments acquired by the labor of one man and acquiesced in by another who has the power to interrupt them; and as, on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle.

In *Dodd v. Holme*, 1 A. & E. 493, where there is a good deal of discussion respecting the rights of owners of adjoining lands or houses, no point of law was determined, as the case turned upon the allegation in the declaration that the defendants dug "carelessly, negligently, unskilfully, and improperly," whereby "the foundations and walls" of the plaintiff's house gave way. The plaintiff's house was proved to have been in a very bad condition; but Lord Denman said that the defendant had no right to accelerate its fall.

The Court of Exchequer, in *Partridge v. Scott*, 3 M. & W. 220, concurred in the law before laid down in this court, that a right to the support of the foundation of a house from adjoining land belonging to another proprietor can only be acquired by grant, and that, where the house was built on excavated land, a grant is not to be presumed till the house has stood twenty years after notice of the excavation to the person supposed to have made the grant; but nothing fell from any of the judges questioning the right to support which land, while it remains in its natural state, has been said to be entitled to from the adjoining land of another proprietor. Some land of the plaintiff's, not covered with buildings, had likewise sunk, in consequence of the defendant's operations in his own land; but the court, in directing a verdict to be entered for the defendants on the whole declaration, seems to have thought that the sinking of the plaintiff's land was consequential upon the fall of the house, or would not have taken place if his own land had not been excavated.

The judges in the Exchequer Chamber held, upon a writ of error from the Court of Common Pleas, in *Chadwick v. Trower*, 6 New

Ca. 1 (see *Trover v. Chadwick*, 3 New Ca. 334), that the mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall which rests upon it, and that he is not even liable for carelessly pulling down his wall, if he had not notice of the existence of the adjoining wall; but this decision proceeds upon the want of any allegation or proof of a right of the plaintiff to have his wall supported by the defendant's, and does not touch the right or obligation of conterminous proprietors, where the tenement to be supported remains in its natural condition.

Next comes the valuable case of *Harris v. Ryding*, 5 M. & W. 60, which would be a direct authority in favor of the present plaintiff if it did not leave some uncertainty as to the effect of the averment in the declaration, of working "carelessly, negligently, and improperly," and as to whether the plaintiff was considered absolutely entitled to have his land supported by the subjacent strata, to whatever degree the affording of this support might interfere with the defendant's right to work the minerals. There one seised in fee of land conveyed away the surface, reserving to himself the minerals, with power to enter upon the surface to work them; and it is said to have been held that, under this reservation, he was not entitled to take all the minerals, but only so much as "could be got, leaving a reasonable support to the surface," p. 70. The case was decided upon a demurrer to certain pleas justifying, under the reservation, and the declaration alleged careless, negligent, and improper working, which there must be considered as admitted, whereas here it is negatived by the verdict; but the barons, in the very comprehensive and masterly judgment which they delivered seriatim, seem all to have thought that the reservation of the minerals would not have justified the defendant in depriving the surface of a complete support, however carefully he might have proceeded in removing them. Lord Abinger says: "The plea is no answer, because it does not set forth any sufficient ground to justify the defendant in working the mines in such a manner as not to leave sufficient support for the land above, which is alleged by the declaration to be a careless, negligent, and improper mode of working them." Parke, B., observes: "It never could have been in the contemplation of the parties that, by virtue of this reservation of the mines, the grantor should be entitled to take the whole of the coal and let down the surface or injure the enjoyment of it;" and again: "This plea is clearly bad, because the defendants do not assign that in taking away the coal they did leave a sufficient support for the surface in its then state." "The question is," says Alderson, B., "whether the grantor is not to get the minerals which belong to him, and which he has reserved to himself the right of getting, in that reasonable and ordinary mode in which he would be authorized to get them, provided he leaves a proper support for

the land which the other party is to enjoy?" My brother Maule, then a judge of the Court of Exchequer, says, in the course of his luminous judgment: "The right of the defendants to get the mines is the right of the mine-owners as against the owner of the land which is above it. That right appears to me to be very analogous to that of a person having a room in a house over another man's room, or an acre of land adjoining another man's acre of land." Parke, B., that he might not be misunderstood as to the right of the owner of the surface, afterwards adds: "I do not mean to say that all the coal does not belong to the defendants, but that they cannot get it without leaving sufficient support." It seems to have been the unanimous opinion of the court that there existed the natural easement of support for the upper soil from the soil beneath, and that the entire removal of the inferior strata, however skilfully done, would be actionable, if productive of damage by withdrawing that degree of support to which the owner of the surface was entitled, the duty of the owner of the servient tenement forbidding him to do any act whereby the enjoyment of the easement could be disturbed.

The counsel for the defendant cited and relied much upon the case of *Acton v. Blundell*, 12 M. & W. 324, in which it was held that a landowner, who, by mining operations in his own lands, diverts a subterraneous current of water, is not liable to an action at the suit of the owner of the adjoining land, whose well is thereby laid dry. But the right to running water and the right to have land supported are so totally distinct, and depend upon such different principles, that there can be no occasion to show at greater length how the decision is inapplicable.

We have now to mention the case of *Hilton v. Lord Granville*, 5 Q. B. 701. A writ of error may probably be brought in this case,¹ when all the issues of fact have been disposed of; and nothing which I now say is to preclude me from forming any opinion upon it, should I ever hear it argued. If well decided, the plaintiff is justified in relying upon it; for it is strongly in point. This court there held that a prescription or a custom within a manor for the lord, who is seised in fee of the mines and collieries therein, to work them under any dwelling-house, buildings, and lands, parcel of the manor, doing no unnecessary damage, and paying to the tenants and occupiers of the surface of lands damaged thereby a reasonable compensation for the use of the surface of the lands, but without making compensation for any damage occasioned to any dwelling-houses or other buildings within or parcel of the manor by or for the purpose of working the said mines and collieries, is void as being unreasonable. Lord Denman, C. J., said: "A claim destructive of the subject-matter of the grant cannot be set up by any usage. Even if the grant could be produced in specie, reserving a right in the lord to deprive his

¹ See 12 Q. B. 737, note.

grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd. That the prescription or custom here pleaded has this destructive effect, and is so repugnant and void, appears to us too clear from the simple statement to admit of illustration by argument."

The most recent case referred to was *Smith v. Kenrick*, 7 C. B. 515, 564, in which the Court of Common Pleas, after great deliberation, held that it is the right of each of the owners of adjoining mines, where neither mine is subject to any servitude to the other, to work his own mine, as far as the flow of water is concerned, in the manner which he deems most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine; so that such prejudice does not arise from the negligent or malicious conduct of his neighbor. But no question arose there respecting any right to support; the controversy being only respecting the obligation to protect an adjoining mine from water which may flow into it by force of gravitation. And in the very learned judgment of the court, delivered by my brother Cresswell, there is nothing laid down to countenance the doctrine that, in a case circumstanced like this which we have to determine, the owner of the minerals may, if not chargeable with malice or negligence, remove them so as to destroy or damage the surface over them which belongs to another.

We have attempted, without success, to obtain from the codes and jurists of other nations information and assistance respecting the rights and obligations of persons to whom sections of the soil, divided horizontally, belong as separate properties. This penury, where the subject of servitudes is so copiously and discriminately treated, probably proceeds from the subdivision of the surface of the land and the minerals under it into separate holdings being peculiar to England. Had such subdivision been known in countries under the jurisdiction of the Roman civil law, its incidental rights and duties must have been exactly defined where we discover the right of adjoining proprietors of lands to support from lateral pressure leading to such minute regulations as the following: "*Si quis sepem ad alienum praedium fixerit, infoderitque, terminum ne excedito: si maceriam, pedem relinquito: si vero domum, pedes duos: si sepulchrum aut scrobem foderit, quantum profunditatis habuerint, tantum spatii relinquito: si puteum, passus latitudinem.*" Dig. lib. x., tit. 1 (*Finium regundorum*), 1. 13.

The Code Napoleon likewise recognizes the support to which the owners of adjoining lands are reciprocally entitled, but contains nothing which touches the question for our decision more closely than the following article on "Natural Servitudes."¹ "*Les fonds inférieurs sont assujettis, envers ceux qui sont plus élevés, à recevoir les eaux*

¹ "*Servitudes qui dérivent de la situation des lieux.*"

qui en découlent naturellement sans que la main de l'homme y ait contribué." "Le propriétaire supérieur ne peut rien faire qui aggrave la servitude du fonds inférieur." Code Civil, liv. 2, tit. iv. ch. 1, art. 640. But reference is here made to adjoining fields on a declivity, not to the surface of land and the minerals being held by different proprietors.

The American lawyers write learnedly on the support which may be claimed for land from lateral pressure and for buildings which have long rested against each other, but are silent as to the support which the owner of the surface of lands may claim from the subjacent strata when possessed by another. See Kent's Commentaries, part vi. lecture lii. vol. iii. p. 434, ed. 1840.

However, in Erskine's Institutes of the Law of Scotland, treating of the servitude *Oneris ferendi*, the very learned author has the following passage, which well illustrates the principle on which our decision is founded:—

"Where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh, the proprietor of the ground floor is bound merely by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property, that it may be capable of bearing that weight." "The proprietor of the ground story is obliged to uphold it for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower." Book ii. tit. 9, s. 11, vol. i. p. 433 (Ivory's ed. 1828).

For these reasons, we are all of opinion that the present action is maintainable, notwithstanding the negation of negligence in the working of the mines; and that the rule to enter a verdict for the defendant must be discharged. We need hardly say that we do not mean to lay down any rule applicable to a case where the *prima facie* rights and liabilities of the owner of the surface of the land and of the subjacent strata are varied by the production of title-deeds or by other evidence.

Rule discharged.

CHAPTER XVI.

VIOLATION OF WATER RIGHTS.

SPRINGFIELD *v.* HARRIS.

Supreme Court of Massachusetts, September, 1861. 4 Allen, 494.

TORT by the City of Springfield for the obstruction of a natural stream of water by means of a dam.

At the trial in the Superior Court, before Vose, J., there was evidence to show the uses which the plaintiffs have heretofore made of the water of the stream, where it crosses Main Street in the city of Springfield, below the defendant's land, and the method in which the defendant has used and obstructed the same; and it was a question in dispute whether the plaintiffs had established a title to Main Street. Upon the evidence in respect to the latter question, the facts not being denied, the judge ruled that the plaintiffs had not made out their title, and he directed the jury to return a verdict for the defendant, and also to answer the two following questions: "1. Is the dam of the defendant of such magnitude as is adapted to the size and capacity of the stream, and to the quantity of water usually flowing therein? 2. Is the mode of using the dam by the defendant, by closing the gate at night for the purpose of letting the pond fill, an unusual and unreasonable use, according to the general custom of the country in cases of dams upon similar streams?" The judge instructed the jury that, in answering these questions, they were to decide as practical men, upon the evidence in the case, with their judgments aided by the testimony of the experts, and the evidence relative to the general usage or custom of the country, or to dams upon similar streams, and by their own view of the premises, and that they were not to take into view the rights claimed by the plaintiffs in determining the facts involved in these inquiries.

The plaintiffs made no objections to these instructions, and did not ask for any others; and the jury answered the first question in the affirmative, and the second in the negative.

To the ruling of the judge directing the jury to return a verdict for the defendant, the plaintiffs alleged exceptions.

MERRICK, J. It appears from the pleadings, and from the facts stated in the bill of exceptions, that Garden Brook is a natural stream running by and over the land of the defendant, and thence through Main Street in the city of Springfield. The plaintiffs claim to be

owners in fee of all the land included within the limits of said street, and that they are entitled to have the water flow in said stream at all times without obstruction, in order that they may use it, as they have a right to do, for sewerage, for extinguishing fires, and for all other purposes essential to the health and safety of the city. The defendant is the owner and occupant of a mill standing upon his said land; and he admits that during the whole period in which the obstruction complained of is alleged to have occurred, he has, in operating his mill and the works contained in it, used the water of said stream by means of a dam, which for that purpose he has erected and maintained across it. The plaintiffs in their declaration allege that this dam was and is "of a larger magnitude than is adapted to the size and capacity of the stream, and to the quantity of water usually flowing therein." And this is the particular grievance of which they complain, and which they set forth as their cause of action against the defendant.

The action can be maintained only by the proof of this material allegation; for the defendant had a right to use the water in a reasonable and lawful manner to work and operate his mill, whatever might be the effect of such use in reference to any easement to which proprietors of land situate at any point below it might otherwise be entitled. Each proprietor of land through which a natural water-course flows has a right as owner of such land, and as inseparably connected with and incident to it, to the natural flow of the stream for any hydraulic purpose to which he may think fit to apply it; and it is a necessary consequence from this principle that such proprietor cannot be held responsible for any injurious consequences which result to others, if the water is used in a reasonable manner, and the quantity used is limited by, and does not exceed, what is reasonably and necessarily required for the operation and propulsion of works of such character and magnitude as are adapted and appropriate to the size and capacity of the stream and the quantity of water usually flowing therein. *Thurber v. Martin*, 2 Gray, 394; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Tourtellot v. Phelps*, 4 Gray, 376.

The jury having found, under instructions in matter of law which are admitted to have been correct and unobjectionable, that the plaintiffs have failed to establish the material allegations in their declaration relative to the dam erected and maintained by the defendant across the stream, and having also found that the said dam is only of such magnitude as is adapted to the size and capacity of the stream and to the quantity of water usually flowing therein, and that the manner in which he used the water was not an unusual or unreasonable use of it, according to the general custom of the country in cases of dams upon similar streams, it is obvious that the plaintiffs were not entitled to recover any damages, and therefore that the verdict was properly rendered for the defendant.

It is objected that the court erred in ruling that the plaintiffs had not upon the evidence shown that they had acquired any prescriptive right to the water in the brook, and in directing the jury for that reason to return a verdict for the defendants. It would have been more regular to reserve these directions, which were predicated wholly upon questions of law, and to submit to the jury the questions of fact in issue, which were specially submitted to them with instructions that if they found the first in the affirmative and the second in the negative, they should in that case render a verdict for the defendant. But as we do not perceive that the plaintiffs were at all prejudiced or subjected to any disadvantage by the course pursued, such irregularity affords no sufficient cause for disturbing the verdict, which was rendered exclusively upon particular questions of fact which were wholly independent of and distinct from the questions of law. And as the finding of the jury upon those particular questions makes it certain that the plaintiffs could in no event maintain their action, it becomes unnecessary to consider whether the ruling of the court in relation to the plaintiffs' alleged title was correct; for whether they owned the soil, or had acquired any prescriptive right to the use of the water, or were mere riparian proprietors, it is obvious that judgment must necessarily, upon the finding of the jury upon those questions of fact, be rendered for the defendant.

Exceptions overruled.

ELLIOT v. THE FITCHBURG RAILROAD COMPANY.

Supreme Court of Massachusetts, October, 1852. 10 Cush. 191.

THIS action was tried in this court, at the October term, 1849, before Metcalf, J., under whose rulings a verdict was found for the defendants. The plaintiff excepted to the rulings and instructions, which, with the facts of the case, sufficiently appear in the opinion.

SHAW, C. J. This is an action of the case against the defendants, for diverting the water of a small brook, passing through land of the plaintiff in Shirley. The facts are briefly these: The plaintiff is the owner of certain land, and for more than sixty years a small brook, having its sources in several ponds, has, in its natural course, flowed through lands of various persons, viz., of one Clark, of one Furnin, and then through the plaintiff's land, which is about half a mile below said Clark's, and from the plaintiff's land, through various other lands, to Nashua River. Said brook was in part supplied by a never-failing spring, on said Clark's land, near said brook, and having its outlet into it. The defendants, pursuant to a warranty deed from said Clark, of a perpetual right and privilege to make and maintain a dam and reservoir, and draw and use the water therefrom, erected

such dam across said stream, below said spring, and made said reservoir upon and about the same, and inserted a lead pipe therein, by means of which they have used and constantly taken water, from said reservoir, to their depot in Shirley, and used the same for furnishing their locomotive steam-engines with water, and for other similar purposes. The defendants offered evidence tending to prove that said Clark, where said brook runs through his meadow, which is wet and springy, had cut ditches across the meadow to the brook, thereby increasing the flow of water to the brook; and it was further proved that there is no outlet for the water of said meadow, except into this brook. The meadow is situate below the dam.

The plaintiff contended that if the jury were satisfied of the existence of the brook, as alleged, and the diversion of the water therefrom by the defendants, he was entitled to a verdict for nominal damage, without proof of actual damage. But the presiding judge instructed the jury that unless the plaintiff suffered actual perceptible damage in consequence of the diversion, the defendants were not liable in this action. In connection with this instruction, the judge further instructed the jury that if they believed that the defendants, by excavating said reservoir and spring above the dam, or that said Clark, by digging said ditches, had increased the flow of water in said brook, equal to the quantity of water the defendants had diverted therefrom, then the defendants were not liable in this action.

The whole court are of opinion that this direction was right in both particulars.

This appears to have been a small stream of water; but it must, we think, be considered that the same rules of law apply to it, and regulate the rights of riparian proprietors, through and along whose lands it passes, as are held to apply to other watercourses, subject to this consideration, that what would be a reasonable and proper use of a considerable stream, ordinarily carrying a large volume of water, for irrigation or other similar uses, would be an unreasonable and injurious use of a small stream, just sufficient to furnish water for domestic uses for farmyards, and watering-places for cattle.

The instruction requested by the plaintiff is, we think, founded on a misconception of the rights of riparian proprietors in watercourses passing through or by their lands. It presupposes that the diversion of any portion of the water of a running stream, without regard to the fitness of the purpose, is a violation of the right of every proprietor of land lying below, on the same stream, so that, without suffering any actual or perceptible damage, he may have an action for the sole purpose of vindicating his legal right.

The right to flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris*, of such character that whilst it is common and equal to all, through whose land it runs, and no one can obstruct or divert it, yet, as one of the

beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agriculture or manufacturing purposes would cause no sensible or practicable diminution of the benefit to the prejudice of a lower proprietor; whereas, taking the same quantity from a small running brook passing through many farms would be of great and manifest injury to those below, who need it for domestic supply or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case and not in the former. It is therefore, to a considerable extent, a question of degree; still, the rule is the same, that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use, and for manufacturing and agricultural purposes.

It has sometimes been made a question whether a riparian proprietor can divert water from a running stream for purposes of irrigation. But this, we think, is an abstract question which cannot be answered either in the affirmative or negative, as a rule applicable to all cases. That a portion of the water of a stream may be used for the purpose of irrigating land, we think is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor cannot under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the watercourse, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it, if not diverted or used unreasonably. The point may, perhaps, be best illustrated by extreme cases. One man, for instance, may take water from a perennial stream of moderate size, by means of buckets or a pump—for the mode is not material—to water his garden. Another may turn a similar current over a level tract of sandy soil of great extent, which, in its ordinary operation, will nearly or quite absorb the whole volume of the stream, although the relative position of the land and stream are such, that the surplus water, when there is any, is returned to the bed of the stream. The one might be regarded as a reasonable use, doing no perceptible damage to any lower proprietor, whilst the other would nearly deprive him of the whole beneficial use, and yet, in both, the water would be used for irrigation. We cite a few of the leading cases in Massachusetts on this subject. *Weston v. Alden*, 8 Mass. 136; *Colburn v. Richards*, 13 Mass. 420; *Cook v. Hull*, 3 Pick. 269; *Anthony v. Lapham*, 5 Pick. 175.

This rule, that no riparian proprietor can wholly abstract or divert a watercourse, by which it would cease to be a running stream, or use it unreasonably in its passage, and thereby deprive a lower proprietor of a quality of his property, deemed in law incidental and beneficial, necessarily flows from the principle that the right to the reasonable and beneficial use of a running stream is common to all the riparian proprietors, and so each is bound so to use his common right as not essentially to prevent or interfere with an equally beneficial enjoyment of the common right by all the proprietors. Were it otherwise, and were it an inflexible rule that each lower proprietor has a right to the full and entire flow of the natural stream, without diminution, acceleration, or retardation of the natural current, it would follow that each lower proprietor would have a right of action against any upper proprietor for taking any portion of the water of the stream for any purpose; such a taking would be a disturbance of his right; and if taken by means of a pump, a pipe, a drain, or otherwise, though causing no substantial damage, it would be a nuisance, and warrant the lower proprietor in entering the close of the upper to abate it. *Colburn v. Richards*, 13 Mass. 420.

It would also follow, as the legal and practical result, that no proprietor could have any beneficial use of the stream, without an encroachment of another's right, subjecting him to actions toties quoties, as well as to a forcible abatement of the nuisance. If the plaintiff could, in a case like the present, have such an action, then every proprietor on the brook, to its outlet in Nashua River, would have the same; and because the quantity of diminution is not material, every riparian proprietor on the Nashua would have the same right, and so every proprietor on the Merrimack River to the ocean. This is a sort of *reductio ad absurdum*, which shows that such cannot be the rule, as was claimed by the plaintiff.

Without intending at present to state the authorities fully, we refer to the following English cases, as tending to illustrate and fix the rule as stated: *Bealey v. Shaw*, 6 East, 208; *Duncombe v. Randall*, Hetley, 32; *Williams v. Morland*, 2 B. & C. 910; 4 Dow. & Ry. 583; *Wright v. Howard*, 1 Sim. & Stu. 190.

If the use which one makes of his right in the stream is not a reasonable use, or if it causes a substantial and actual damage to the proprietor below, by diminishing the value of his land, though at the time he has no mill or other work to sustain present damage, still, if the party thus using it has not acquired a right by grant, or by actual appropriation and enjoyment twenty years, it is an encroachment on the right of the lower proprietor, for which an action will lie. *Mason v. Hill*, 3 B. & Ad. 304; 5 B. & Ad. 1; *Wood v. Waud*, 3 Welsby, Hurlst. & Gord. 748. But the doctrine is much discussed and settled on deliberation, in a recent case decided in the Court of Exchequer. *Embrey v. Owen*, 6 Welsby, Hurlst. & Gord. 353.

The right to the use of flowing water is *publici juris*, and common to all the riparian proprietors; it is not an absolute and exclusive right to all the water flowing past their land, so that any obstruction would give a cause of action; but it is a right to the flow and enjoyment of the water, subject to a similar right in all the proprietors to the reasonable enjoyment of the same gift of Providence. It is therefore only for an abstraction and deprivation of this common benefit, or for an unreasonable and unauthorized use of it, that an action will lie; but for such deprivation or unwarrantable use an action will lie, though there be no actual present damage. So it is subsequently stated in the close of the case last cited: "so long as this reasonable use by one man of this common property does no actual and perceptible damage to the right of another to the similar use of it, no action will lie."

We think the most reliable American authorities are to the same effect. 3 Kent Com. (6th ed.) 439; Angell on Watercourses, ch. iv.; *Blanchard v. Baker*, 8 Greenl. 253; *Tyler v. Wilkinson*, 4 Mason, 397; *Webb v. Portland Manufacturing Co.*, 3 Sumner, 189; *Anthony v. Lapham*, 5 Pick. 175. The same doctrine has been held in a recent case in New York. *Van Hoesen v. Coventry*, 10 Barb. 518.

In applying these rules to the present case, we are to consider that Clark, who owned the land on which the dam was built, and the defendants to whom he conveyed all his right to the use of the water, as holding together the whole right; and it is to be considered in the same manner as if the defendants owned the land. We think it was properly left to the jury to find whether the defendants, claiming in the right of Clark had, by their diversion of the water for a valuable and highly beneficial use, caused any actual or perceptible damage, and, if not, to find for the defendants. It is very clear that here is no complaint of the total diversion of the stream from the plaintiff's land; no such ground of complaint is set forth or relied on. The bed of the stream and the stream itself remains and passes through the plaintiff's land as it did before. The gravamen of the complaint is not for diverting the stream itself, but for abstracting a part of the water of the stream. This is a right which each proprietor has, if exercised within a reasonable limit. The proper question therefore was, whether, in the mode of taking, in the quantity taken, and the purpose for which it was taken, there was a reasonable and justifiable use of the water by Clark. The use being lawful and beneficial, it must be deemed reasonable, and not an infringement of the right of the plaintiff, if it did no actual and perceptible damage to the plaintiff; and therefore we think that question of fact was rightly left to the jury, who must have found that it did him no such damage.

We consider the other direction correct also, as we understand it. The question was not, if the defendants had caused a damage to the

plaintiff, amounting in law to a disturbance of his right, for which an action would lie, whether it would be barred by an advantage of equal value, conferred in nature of a set-off; but whether, the improvements of Clark upon his meadow taken together as a whole including the dam and ditches as parts of one and the same improvement, any damage was done to the plaintiff; and this, we think, was correctly so left.

It may perhaps be proper to guard against misconstruction, in considering what are the general rights and duties of persons owning lands bounding on running streams, by the general rules of law and for general purposes, that some alterations of these rules may be effected in Massachusetts, by the acts of legislation on that subject, in respect to mills, and the construction which has been judicially put upon such legislative acts. This system originated with the provincial act, 13 Anne, passed in 1714, Ancient Laws and Charters 404. This act by its operation necessarily secures, to some extent, advantages to the prior occupant of a stream, by a dam erected to work a mill. *Bigelow v. Newell*, 10 Pick. 348; *Bemis v. Upham*, 13 Pick. 167; *Baird v. Wells*, 22 Pick. 312.

It is not necessary, however, now to go into this subject, but merely to say that the rights to streams of running water, upon which the present question turns, are not dependent upon or affected by the mill acts.

Exceptions overruled.

FRAZIER v. BROWN.

Supreme Court of Ohio, December, 1861. 12 Ohio St. 294.

THE plaintiff, now plaintiff in error, alleged in substance that he was at the time of the grievance complained of owner in possession of certain land, upon which, near his dwelling-house, there had been from time immemorial a valuable spring of water, from which a never-failing rivulet or stream of water had always flowed over his land; and that the defendant, an adjoining landowner, "well knowing the premises, but contriving and wickedly intending to injure the plaintiff, and to destroy said spring and the stream of water issuing therefrom," did in 1856, "by means of a certain hole wickedly and maliciously dug" in the defendant's land adjoining, "for the purpose of destroying said spring, and diverting the stream or rivulet . . . from running across . . . the aforesaid premises of the plaintiff," destroy said spring and divert the water issuing therefrom away from the plaintiff's premises. To the plaintiff's damage, &c.

Demurrer to the foregoing sustained by the Court of Common Pleas, and judgment rendered for the defendant; to reverse which

the plaintiff filed this petition in error, in a case reserved for the Supreme Court.

BRINKERHOFF, J. On approaching the questions presented by the demurrer to the petition in this case, and attempting to examine them in the light of the decisions which appear to have a bearing upon them, those decisions seem, at first, to involve no little contradiction and uncertainty. But this seeming uncertainty and contradiction in the cases is owing to the want of a classification of the general subject into certain distinct branches of inquiry, into which the general subject naturally falls. When this classification is made, the seeming contradictions in the cases almost wholly disappear; and the cases drop in under the different heads of inquiry to which they properly belong, and assume a real and very satisfactory consistency with each other.

In considering the relative rights and obligations of owners of adjoining lands in respect to water passing from the lands of one to those of the other, the subject naturally divides itself into four branches of inquiry; and this on account of the four different modes in which water may, and sometimes does, pass from one tract of land to another.

1. In respect to surface streams which flow in a permanent, distinct, and well-defined channel from the lands of one owner to those of another.

2. In respect to surface waters — however originating — which without any distinct or well-defined channel, by attraction, gravitation, or otherwise, are shed and pass from the lands of one proprietor to those of another.

3. Subterranean streams which flow in a permanent, distinct, and well-defined channel from the lands of one to those of another proprietor.

4. Subsurface waters, which, without any permanent, distinct, or definite channel, percolate in mere veins, ooze, or filter from the lands of one owner to the lands of another.

The whole subject, in all its branches, is governed by two general and fundamental maxims: which are — first, that the estate, usufruct, and dominion of the owner of lands extend from the sky to the lowest depths of the earth; second, that every man shall so use his own as not to injure his neighbor. These maxims, however, like most general rules, are, in their application, subject to modifications or exceptions, growing out of certain great principles of natural right, anterior in their origin, and superior in their obligation, to all individual proprietorship; out of certain paramount considerations of public policy; and from the established principle, that, however great or obvious the damage may be, the law will regard as an injury that only which contravenes or interferes with a recognized legal right.

Thus 1, in regard to the branch of inquiry first above-named, to

wit, surface streams flowing in a permanent, distinct, and definite channel, it is now too well settled to require the citation of authorities for its support, that notwithstanding the maxim which affirms the absolute and unlimited dominion of the proprietor of the soil upward and downward, the proprietor below has, in the absence of any modification of relative rights by contract or prescription, no right to throw the water back on him above, and has the right to receive it from the proprietor above substantially undiminished in quantity and uncorrupted in quality; and this right arises, not from any supposed grant or from prescription, but *ex jure naturae*, and for the reason that surface streams of flowing water are the gift of Providence, for the benefit of all lands through which they flow, and as such their usufruct is appurtenant to the lands through which they flow.

2. In respect to surface waters which, without any permanent, distinct, and definite channel, are shed, or, by any means pass, from the lands of one to those of another proprietor, — it seems now to be the established doctrine, that, unless some right derived from actual contract or positive legislation intervene, the doctrine which asserts the absolute dominion of proprietors applies to its full extent and without exception. Paramount considerations of public policy forbid the acquisition of any right in such waters by an adjoining proprietor on the ground of prescription. Otherwise than on the ground of actual contract or positive legislation, he can have no legal right in such waters; and whatever damage he may suffer by reason of the exercise of his neighbor's rightful command over his own soil, is *damnum absque injuria*. To this effect the cases are nearly uniform, and seem to rest on a broad and sound basis of reason and policy. *Rauston v. Taylor*, 11 Exch. Rep. 369; *Broadbent v. Ramsbotham*, Id. 602; *Luther v. Winnisimmet Company*, 9 Cush. 171; *Wheatley v. Baugh*, 25 Penn. St. Rep. (1 Casey) 528. The only case that I can find which holds a contrary doctrine, is *Balston v. Bensted*, 1 Camp. 463. But that was a case at *nisi prius*, doubtless hastily decided, and which, in the later cases, has not been followed, or regarded as authoritative.

3. In respect to subsurface streams, which, though under ground, yet flow in a permanent, distinct, and well-defined channel unmixed with the earth through which they flow, such streams, it is notorious, are occasionally found to exist in various geological formations; though they are more abundant, both in frequency and volume, in limestone regions. As is said by Lewis, C. J., in *Wheatley v. Baugh*, above cited, "In limestone regions streams of great volume and power pursue their subterranean courses for great distances, and then emerge from their caverns, furnishing power for machinery of every description, or supplying towns and settlements with water, for all the purposes of life." And he adds that "when the filtrations are gathered into sufficient volume to have an appreciable value, and to

flow in a clearly-defined channel, it is generally possible to see it, and to avoid diverting it without serious detriment to the owner of the land through which it flows;" and he expresses the opinion, that "to say that these streams might be obstructed or diverted, merely because they run through subterranean channels, is to forget the rights and duties of man in relation to flowing water." He is, evidently, of opinion that subterranean streams, as distinguished from subterranean percolations are governed by the same rules, and give rise to the same rights and obligations as flowing surface streams. But the case he was considering did not necessarily involve any question in reference to clearly-defined subterranean streams; and his opinion, therefore, though certainly entitled to great weight, as the opinion of a jurist who evidently has very thoroughly considered the general subject, and has discussed it with great and comprehensive ability, can hardly be regarded as authoritative.

To this branch of inquiry, too, the case of *Smith v. Adams*, 6 Paige, 435, is clearly referable. That was a bill in Chancery, by an owner below, to restrain, by injunction, an owner above from diverting a portion of the water of a subterranean stream which, on the complainant's land, and a few feet from the line between the parties, issued from a channel in a ledge of slate rock, and there formed a spring; and which subterranean stream the defendant, on his own land, though but a few feet above where it issued on the complainants' land, had tapped, and, by means of an aqueduct of logs, had diverted a portion of its waters to his own purposes, and out of their natural channel. The Chancellor expressed the opinion that the partial diversion of the water of the underground stream was wrongful; but inasmuch as the small quantity of water diverted, and the trifling amount of damage done, brought the case within the rule of *de minimis*, he dismissed the bill, and left the complainant to his remedy at law.

Parke, B., in *Dickinson v. The Grand Junction Canal Company*, 9 E. L. & E. Rep. 521, also speaking of surface streams, says, "When water is on the surface, the right of the owner of adjoining land to the usufruct of that water is not a doubtful matter of fact — it is public and notorious — and such a right ought, as a matter of course, to be respected by every one; and, indeed, if the course of a subterranean stream were well known — as is the case with many, which sink underground, pursue for a short space a subterranean course, and then emerge again — it never could be contended that the owner of the soil, under which the stream flowed, could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground." And it will be observed that both Baron Parke and Chief Justice Lewis intimate the opinion, that, in order to bring subterranean streams within the rules which govern surface streams,

their existence and their course must be, to some extent, known or notorious. And it seems to me that, if the question should ever arise, the rights and obligations of adjoining proprietors would have to be subjected to this limitation; and this for the reason — which will be more fully noticed hereafter — that the law cannot properly limit the ordinarily absolute dominion of the owner of the soil, in respect to things concealed and hidden in the bowels of the earth, nor recognize an adjoining proprietor as having claims upon, or rights in, a thing passing under the surface of his neighbor's land, the existence of which was first revealed by the very act which would constitute the subject-matter of his complaint.

But all the opinions to which I have adverted under this head of the general subject, are obiter dicta; the questions considered did not necessarily arise in any of the cases in which the opinions were expressed, — not even in the case of *Smith v. Adams*; they were there, as they are here, rather matters of curious speculation than otherwise; though the subjects to which they relate must necessarily be noticed, in order to a proper classification of the general subject, and a more ready apprehension of the distinctions which it involves. But the questions remain undecided; and we leave them where we find them, — open to future consideration and adjudication, under the further lights which the future may develop.

4. We come now to the last branch of inquiry, named in our classification; to wit, as to the rights, if any, which a landowner has, — in the absence of anything arising from either express contract or positive legislation in respect to subsurface waters, which without any distinct, definite, and known channel, ooze, filter, or percolate in small veins from the lands of his neighbor into his own.

It is under this head that the questions made by the demurrer to the petition in this case clearly fall. For it is nowhere alleged in the petition that the waters, the abstraction and detention of which is complained of, reach the lands of the plaintiff in any distinct, definite, or known channel, either above or below the surface; but on the contrary the petition describes them as a spring which “issued and oozed” out of the land of the plaintiff, and from which spring a rivulet ran and meandered over and through the plaintiff's lands. Distinct and well-defined subterranean streams of water are comparatively rare; their existence, in any case, cannot properly be presumed; and the most liberal construction which can be given to the language of this petition will not justify us in considering it is as alleged, that any such stream passes from the lands of the defendant to those of the plaintiff; and there is no claim that the natural rights of the parties, growing out of their relations of proximity to each other, have in any way been modified by either contract or legislation. The plaintiff is bound to state facts which — the statements being liberally construed — constitute a cause of action; and if everything

which he avers in his petition may be true, and yet no cause of action exist, then the demurrer to the petition was rightfully sustained.

What was the object for which the "hole" of which the plaintiff complains, was designed, we are not fully informed. It may have been a well for domestic use, or for watering stock; or a surface reservoir for watering stock,—not uncommon in some parts of this State; it may have been a cellar, stone quarry, mine, or coalpit; a salt well, or an oil well; or it may have been a fish-pond, or a miniature water view, for purposes of ornament, made in an effort in landscape gardening. For aught that appears in the petition, it may have been any of these, and embracing in its object also the malicious design to injure the plaintiff, as averred in the petition.

And it certainly is possible, that it may have been dug by the defendant from motives of unmixed malice, without any object, and, when done, incapable of answering any end, either of ornament, convenience, or profit, connected with the enjoyment and use of his property. And such a case, should it ever arise, is reserved for future consideration.

The question then is, whether—in the absence of all rights derived either from contract or legislation—a landowner can have any legal claims in respect to subsurface waters which, without any distinct, and definite channel, ooze, filter, and percolate from adjoining lands into his own, when such waters are diverted, retained, or abstracted by the owner of such adjoining lands in the use of his property, for any object of either taste or profit, even though the use may be accompanied by a malicious intent to injure his neighbor by means of such use. Whatever points of casuistry may arise out of this question, cognizable in the court of individual conscience under the perfect law of Christian morals, we are of opinion that the law of the land can recognize no such claims; and that, subject only to the possible exception of a case of unmixed malice, the maxim "*cujus est solum ejus est usque ad coelum, et ad infernos*" applies to its full extent; and whatever damage may result from the exercise of this absolute right of property, to adjoining proprietors from the loss of such percolating subsurface waters, is *damnum absque injuria*. With the exception of the *nisi prius* decision of Lord Ellenborough, in *Balston v. Bensted*, before referred to, and an obiter opinion of Parke, B., in *Dickinson v. The Grand Junction Canal Co.*, *supra*, the current of decisions, to this effect, both in England and the United States, is uniform and consistent. I say, the opinion of Parke, B., in *Dickinson v. The Grand Junction Canal Co.*, was obiter; for, on an inspection of that case it will be seen, that the plaintiff's rights, as there claimed by him, were rested on a basis of express contract; and there was no occasion to pass upon any principle of natural right growing out of the other relations of the parties.

The reasoning on which this current of decision proceeds is en-

tirely satisfactory to us, and will be developed as we proceed with a brief review of the more prominent cases.

The first case arising in this country, and bearing directly on the question before us, of which we are aware, is *Greenleaf v. Francis*, 18 Pick. 117. It was an action on the case. The plaintiff had dug a well in her cellar, two or three feet from the line between her land and that of the defendant, in which the water rose to the surface of the well. Within less than twenty years thereafter, the defendant, after ascertaining the exact situation of the plaintiff's well, dug a well for his own use, on his own land, about the same distance from the line, and as near to it as the party walls between the cellars would admit; in consequence of which — it would seem — the defendant obtained a good well; but the plaintiff's well became dry. On the trial of the case "the plaintiff requested the judge to instruct the jury, that if they were satisfied that the defendant so placed his well, with the design and intent thereby to draw off the water from the plaintiff's well into his own, they should return a verdict for the plaintiff. But the judge instructed the jury, that the defendant had a legal right to dig a well upon any part of his own land for the purpose of obtaining water for his own use; that if he dug the well where he did, for this purpose, he was justified in so doing, although the effect might be to diminish the water in the plaintiff's well; that if he dug the well where he did, for the purpose of injuring the plaintiff, and not for the purpose of obtaining water for his own use, he was liable in this action; but that if he dug his well, for the purpose of accommodating himself with water, he was not liable for so doing, even if he, at the same time, entertained hostility toward the plaintiff and a desire to injure her, and these feelings were thereby gratified." The jury, under these instructions, having returned a verdict for the defendant, and a motion for a new trial having been reserved for decision by the whole court, it was held that there was no error in the instructions given to the jury, and a judgment was rendered upon the verdict. And Putnam, J., in delivering the opinion of the court, among other things, says, — "There is not evidence of any adverse use or possession at all. For the defendant had no means of knowing that the plaintiff's well was supplied by springs in the defendant's soil, until the defendant dug for water there for his own use. . . . Indeed there is nothing in the case at bar, which limits or restrains the owners of these estates, severally, from having the absolute dominion of the soil, extending upward and below the surface so far as each pleases." And, by way of support to the opinion expressed, that "there is not evidence of any adverse use or possession at all," he adds — "he" (the defendant) "sustained no injury by the use which the plaintiff made of the water which she found in her own well;" thus suggesting the idea — more fully noticed hereafter — that the doctrine of prescription, or presumption of grant

from lapse of time, can have no proper application to a case where the party against whom it is sought to apply it, must, from the nature of the case be unconscious of, or at least uncertain in regard to, any injury or infringement of his rights. The next case, in the order of time, is *Roath v. Driscoll*, 20 Conn. 533. This was a bill in chancery, complaining of an injury to the plaintiff, by means of a diversion of water by the defendant, and asking for an injunction. And the question made and considered was — “Can one of two adjoining proprietors, by first opening a watering place, prevent other persons from doing the same, on their own land; though by so doing, water is prevented from percolating the land so as to supply the first-made reservoir.” The question was answered in the negative. And Ellsworth, J., discussing the case, and delivering the opinion of the court, says — “Nothing is gained by a mere continued preoccupation of water under the surface. Why should any advantage be gained by preoccupation? Each owner has an equal and complete right to the use of his land, and to the water which is in it. Water, combined with the earth, or passing through it, by percolation, or by filtration, or chemical attraction, has no distinctive character of ownership from the earth itself; not more than the metallic oxides of which the earth is composed. Water, whether moving or motionless in the earth, is not, in the eye of the law, distinct from the earth. The laws of its existence and progress, while there, are not uniform, and cannot be known or regulated. It rises to great heights, and moves collaterally, by influences beyond our apprehension. These influences are so secret, changeable, and uncontrollable, we cannot subject them to the regulations of land, nor build upon them a system of rules, as has been done with streams upon the surface.”

Further, we may say, that by general consent of mankind, which is to be inferred from the nature of the right itself, each person must be left to enjoy any natural advantage belonging to his own land; and water, appearing and standing, either naturally or by artificial means, but never constituting a running stream, is such a natural advantage; were it otherwise, one man by sinking a well, though comparatively unimportant, might prevent the sinking of other wells, and the improvement of the neighborhood, by draining marshes, &c., and even the opening of mines of metal or coal; as the water might not percolate, with the same freeness, or abundance as before. Beside, no man is bound to know that his neighbor's well is supplied by water percolating his own soil; and he ought not, therefore, to be held to lose his rights, by such continual enjoyment. He cannot know that the first well requires any other than the natural and common use of water under the surface; nor can he know from whence the water comes; nor by what means it appears in one place or the other; nor which of the persons who first or afterward opens the earth, encroaches upon the right of the other. The law has not

yet extended beyond open running streams. Nor can any light be obtained from the law of surface streams. Such streams are recognized as private property, and their use is regulated by principles of obvious equity and necessity. Their nature is defined; their progress over the surface seen and known, and uniform. They are not in the secret places of the earth, and a part of it; nor is there any secrecy in the influences which move them. As soon as they appear and pass over the surface, they assume a distinct character, and are subject to the great law of gravitation. The purchaser of land knows what he purchases, and what control he can exercise over such a stream, and what are the rights of those above or below him.

Next comes the case of *Chatfield v. Wilson*, 28 Verm. 49. This is a well-considered and strongly-reasoned case both on principle and authority; and it is there held, that "there are no correlative rights existing between the proprietors of adjoining lands, in reference to the use of the water in the earth or percolating under its surface. Such water is to be regarded as part of the land itself, to be enjoyed absolutely by the proprietor within whose territory it is; and to it the law governing the use of running streams is inapplicable." And that "An act legal in itself, and which violates no right, cannot be made actionable on account of the motive which induces it." The case seems to go to the full extent of holding that the act of detaining or diverting subsurface percolating waters from an adjoining proprietor, gives him no right of action, though the act be one, under the circumstances of unmingled malice.

The cases which I have thus far noticed are all cases in which the injury complained of related to wells or reservoirs artificially provided. But the next case — *Ellis v. Duncan*, 21 Barbours S. C. R. 230 — relates to a spring and running stream. It is there held that "the owner of a farm may dig a ditch to drain his land, or open and work a quarry upon it, although by so doing he intercepts one of the underground sources of a spring on his neighbor's land, which supplies a small stream of water flowing partly through the land of each, and thereby diminishes the natural supply of water, to the injury of the adjoining proprietor." And that "the rule that a man has a right to the free and absolute use of his property, so long as he does not directly invade that of his neighbor, or consequentially injure his perceptible and clearly-defined rights, is applicable to the interruption of the subsurface supplies of a stream, by the owner of the soil; and the damage resulting from such an interruption, is not the subject of legal redress." And Strong, J., delivering the opinion of the court in the case, says — "there can be no doubt of the correctness of the injunction, *sic utere tuo ut alienum non laedas*; but I have frequently had occasion to remark that it refers to such injuries only as the law will redress, and not to the large class which are denominated *damnum absque injuria*."

The next case has been already incidentally referred to.—that of *Wheatley v. Baugh*, 25 Penn. St. Rep. 528—in which Chief Justice Lewis discusses the whole subject with a clearness and comprehensive ability certainly not exceeded by anything else which we have been able to find in the books. It is held in that case, that “Where a spring depends for its supply upon percolations through the land of the owner above, and, in the use of the land for mining, or other lawful purposes, the spring is destroyed, such owner is not liable for the damages thus done, unless the injury was occasioned by malice or negligence. Nor would the enjoyment of the spring for twenty-one years raise any presumption of a grant; for no presumption would arise against the owner until it was shown that the exercise of the privilege interfered with his rights in such manner as to entitle him to legal redress.”

In discussing the principles involved in the case, the learned Chief Justice says: “Percolations spread in every direction through the earth; and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land. Accordingly, the law has never gone so far as to recognize in one man a right to convert another’s farm to his own use for the purpose of a filter. Such a claim, if sustained, would amount to a total abrogation of the right of property. No man could dig a cellar, or a well, or build a house on his own land, because these operations necessarily interrupt the filtrations through the earth. Nor could he cut down the forest and clear his land for the purpose of husbandry, because the evaporation which would be caused by exposing the soil to the sun and air would inevitably diminish, to some extent, the supply of water which would otherwise filter through it. He could not even turn a furrow for agricultural purposes, because this would, partially, produce the same result. Even if this right were admitted to exist, the difficulty of ascertaining the fact of its violation, as well as the extent of it, would be insurmountable.”

Turning now to the English cases not already noticed, we come first to *Acton v. Blundell*, 12 M. & W. 324. This case was thoroughly argued and considered; and it was there held, that “the owner of land through which water flows in a subterranean course has no right or interest in it which will enable him to maintain an action against a landowner, who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first mentioned owner, and lays his well dry.” And the quære is added, “if the well had been ancient, whether there would have been any difference?”

The next, and, I believe, the only remaining case to be found in the English books, is *Chasemore v. Richards*, decided in the Exchequer Chamber, on error to the Court of Exchequer in 1857. 2 Hurlstone & Norman’s Ex. R. 168. Except that there was no ingredient of

malice found to exist in the acts of the defendant in that case, it was entirely analogous to the case before us, and involved the same questions. It was there held, that "the owner of a mill on the banks of a river, cannot maintain an action against a landowner who" without malice, but having "reasonable means of knowing the probable and natural effects" of his acts, "sinks a deep well on his own land, and, by pumps and steam-engines, diverts the underground water which would otherwise have percolated the soil, and flowed into the river by which for more than sixty years, the mill was worked." The case was strongly argued before seven judges of the Exchequer Chamber, and Coleridge, J., alone dissented. Unfortunately, a copy of the latest volume of House of Lords' Cases has not yet reached our library; but from a copy of the Weekly Law Gazette, with which counsel have furnished us, we learn that this case was carried to the House of Lords on error, and there unanimously affirmed.¹ Lord Wensleydale (late Parke, B.), whose dictum in *Dickinson v. The Grand Junction Canal Company*, before noticed, was thereby overruled, concurring in the affirmance, though somewhat doubtingly and reluctantly. From this running abstract of the cases bearing immediately upon the question before us, it will be seen, that though the question is one of no little novelty, niceness, and difficulty, yet the current of decision is singularly uniform and consistent. It is evident that if the overwhelming current of authority is to be regarded, the judgment of the Court of Common Pleas must be affirmed. But, as I have already said, the reasoning on which this course of decision proceeds, is, to our minds, as satisfactory as the cases themselves are uniform and consistent.

The reasoning is briefly this: In the absence of express contract, and of positive authorized legislation, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy. 1. Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed, that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would be, therefore, practically impossible. 2. Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility.

That the doctrine of prescription, or presumption of grant from lapse of time, can have no proper application to the question: 1. Because the party against whom the doctrine would have to be ap-

¹ 7 H. L. Cas. 349.

plied, could not be reasonably required to enter his caveat against the appropriation of a thing so hidden and obscure as is percolating underground water; and 2. Because the appropriation of such waters by an adjoining proprietor, is no infringement of his rights, so as to become the subject of legal redress, until such time as he himself has occasion to appropriate them.

And, as an act unlawful in itself, resulting in injury to another, whatever may have been the motive with which it was done, is none the less the subject of legal redress; so the act done, to wit, the using of one's own property, being lawful in itself, the motive with which it is done — whatever it may be as a matter of conscience — is, in law, a matter of indifference. It is hardly necessary to add, that this case does not include, and, in deciding it, we by no means intend to preclude, questions which may arise in a class of cases in which a landowner by positive acts poisons or corrupts the waters which percolate from his lands to those of his neighbor. Such cases are clearly distinguishable from this, and to them the considerations of public policy which govern this case do not necessarily apply. *Wood v. Waud*, 3 Exch. R. 748.

The judgment of the Court of Common Pleas, sustaining the demurrer to the petition, will be

Affirmed.

NOTE: To the same effect on the question of the motive of the defendant, see *Bradford v. Pickles*, 1895, 1 Ch. 145, in the Court of Appeal. At p. 166, A. L. Smith, L. J., says: "In my judgment, by the common law of England a man may deal with his own in any way he pleases, irrespective of what his motive may be, so long as he transgresses no statute, no contract, or the maxim '*sic utere tuo*,' etc."

SWETT v. CUTTS.

Supreme Court of New Hampshire, December, 1870. 50 N. H. 439.

ACTION for damages for causing surface water collected and running in a ditch adjoining a highway to be thrown back upon the plaintiff's land. The declaration in the first count alleged: "There is, and from time immemorial has been . . . contiguous to the land of the said defendant . . . and of the said plaintiff a certain ditch or water-course, in which in seasons of rain and melting snow the water has been wont to gather and accumulate," which water, by means of a depression in the defendant's land, "has [flowed] from time immemorial, until the wrongful acts of the said defendant hereinafter mentioned, and but for said wrongful acts would still . . . flow . . . over and across the said land of the said defendant. Yet the said

defendant, intending to wrong and injure the said plaintiff . . . did . . . build, erect, and place a high embankment or barrier across said depression . . . by reason whereof" the accumulating water has been turned with great force over and upon the plaintiff's land, and thereby the plaintiff's land "has become greatly washed and carried away and said" land of the plaintiff "has thereby been rendered of no value."

There was evidence supporting the declaration, and also that the plaintiff had enjoyed the flow of the water for twenty years and more without interruption, until the acts complained of.

Certain instructions to the jury were asked for by the defendant and refused, which were based on the view that the defendant had an absolute and unqualified right to do as he pleased with the water. Instructions were given on the other hand to the effect that the jury might find, on the evidence before them, that the plaintiff had acquired by prescription a right to the flow of the water in question, and if he had that he was entitled to recover; to this the defendant excepted.

Verdict for the plaintiff; motion for a new trial, also in arrest of judgment on the alleged insufficiency of the declaration.

BELLOWS, C. J. In respect to water not gathered into a stream, but circulating through the pores of the earth, beneath its surface, it is now settled that a landowner who, in the reasonable use of his own land, obstructs or diverts the flow of such water, even to the injury of his neighbor's land, is not liable to respond in damages. This is not upon the principle that has been in some cases adopted, that the landowner has the absolute and unqualified property in all such water as may be found in his soil, and may therefore do what he pleases with it, as with the sand and rock that form part of that soil, but upon the same general principle that governs the use of water flowing on the surface in well-defined streams or channels; that is, to make a reasonable use of it for domestic, agricultural, and manufacturing purposes, not trenching, however, upon the similar rights of others. So in respect to water percolating through the soil, the landowner may ordinarily drain his land, may obstruct the usual course of the flow of such water by walls for cellars and other purposes, and may dig wells and use the water for domestic and agricultural purposes. The test is, the reasonableness of the use or disposition of such water; and ordinarily that is a question of fact for the jury under the instructions of the court.

In favor of the unqualified and absolute right of the landowner to dispose of all such water as he finds in his soil, or that he may draw there by wells dug in his own land, it is urged that he cannot know the condition of the water beneath the surface, the changes that take place, or the sources of supply of the springs and wells in the adjoining lands, or what portion is drawn from his own soil and what was originally found in his neighbor's, and therefore that there is no

ground for presuming a mutual agreement between the landowners in ages past in respect to such underground water or for holding a right to have been acquired by use or acquiescence. So is the leading case of *Acton v. Blundell*, 12 M. & W. 336.

In the first place we do not understand that the right of the riparian owner to the use of streams of water running upon the surface is to be deduced from the presumed mutual agreement or acquiescence of landowners, but rather as a natural right, incident to the land, to partake in the enjoyment of the common bounty of Providence, as in the cases of light and air. *Dickinson v. Grand Junction Canal Co.*, 7 Ex. 299; *Shury v. Piggot*, 3 Bulstr. 339; *Chasemore v. Richards*, 2 H. & N. 168;¹ *Tyler v. Wilkinson*, 4 Mason, 397. And in the second place although it may be true that in the majority of cases the condition of the waterflow beneath the surface is not accurately known, yet in a great many instances its general course, from the slope of the surface, the appearance of springs and other indications of water, is quite obvious. Indeed this doctrine appears to embrace that large class of cases where the water flows in sight upon the surface in wet seasons of the year, but not to such an extent as to mark a regular channel with banks and sides, and also where the water moves slowly, but obviously, through boggy or swampy lands constituting the sources of streams and rivers. The doctrine in fact would justify a landowner in intercepting and diverting the water so working its way through spongy or swampy land at any point, before it was gathered into a regular channel, although it might be obvious that such water was the source of a stream which furnished valuable mill-sites, even although such diversion was in no way necessary to the enjoyment of his land.

The contrary doctrine in respect to water percolating beneath the surface is established in this State in the well-considered case of *Bassett v. Salisbury Manufacturing Co.*, 43 N. H. 569; and the question is, whether the doctrine of that case applies to water which appears on the surface in the season of melting snow and heavy rains, but is not gathered into any regular channel or watercourse, or whether such water stands upon the footing of permanent streams running upon the surface in regular channels. If upon the latter footing, then the instructions were sufficiently favorable to the defendant.

Upon the examination of the cases which maintain the doctrine that the landowner may dispose of the water percolating beneath his soil as he pleases, they will be found to include the case of mere surface water not gathered into streams. In *Rawstron v. Taylor*, 11 Ex. 380, it is laid down by Parke, B., in the opinion of the court, that in the case of common surface water rising out of springy or boggy ground and flowing in no definite channel, although contributing to the supply of the plaintiff's mill, the supply being merely casual and the

¹ 7 H. L. Cas. 349.

water having no defined course, the defendant is entitled to get rid of it as he pleases. The same doctrine is announced in *Broadbent v. Ramsbotham*, 11 Ex. 602, which was an action for diverting water on defendant's land which naturally flowed over the surface of a hill into a brook which supplied plaintiff's mill. The court, per Alderson, B., says the right of the plaintiff cannot extend further than the right to the flow in the brook itself, and to the water flowing in some defined natural channel, either subterranean or on the surface, communicating directly with the brook itself. No doubt, he says, all the water falling from heaven and shed upon the surface of the hill at the foot of which the brook runs must, by the natural force of gravity, find its way to the bottom and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please, and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such a channel.

It is quite clear that such surface water is put upon the same footing as water percolating beneath the surface; and the cases are quite numerous that show it, and we think it should be so upon principle. The great objection to applying the doctrine which forbids the diversion of running streams to water circulating in the pores of the earth is that, if applied without qualification, it would to a great extent prevent the beneficial enjoyment and improvement of one's own land. A similar effect, though less extensive, would be produced by applying that doctrine to mere surface water not gathered into any regular and defined channel. In many cases of springy and swampy lands the water moves from a higher to a lower level over a wide space, which under such a doctrine could not be drained or reclaimed. So in case of rain falling upon the side of a hill, and which would naturally find its way upon the surface into a brook at the bottom — such a doctrine might effectually prevent the improvement of very extensive tracts of land.

Again: the boundary line between what shall be deemed underground percolation and mere surface water would often be extremely difficult to define, and from that source serious embarrassments might arise. From the nature of the case, then, we think that the line is properly drawn between water running in natural streams, with well-defined channels, and that which is merely spread over the surface and flows without any regular course or channel or circulates under the surface through the pores of the earth. The authorities are numerous to this point, besides those already cited. Among them are 3 Kent's Com. 439, note 2, and cases; *Ashley v. Wolcott*, 11 Cush. 192; *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Wheatley v. Baugh*, 25 Penn. St. 528; *Buffam v. Harris*, 5 R. I. 243. See also *Ellis v. Duncan*, 21 Barb. 230; *Washburn, Easements*, 358, and cases cited.

These authorities, to be sure, hold generally that, in respect to mere surface and underground water not gathered into streams, the landowner where it is found has the unqualified right to dispose of it as he pleases, although in some cases the right appears to be limited to cases where it is dealt with in the improvement of such owner's land, and without malice; as in *Wheatley v. Baugh*, 25 Penn. St. 532. But these cases concur in putting all water not gathered into watercourses, whether upon the surface or underneath, on the same footing; and so far we think they are right. As however the case of *Bassett v. Salisbury Manufacturing Co.* holds, in respect to water percolating through the soil, that the landowner's right to obstruct or divert it is limited to what is necessary in the reasonable use of his own land, we think the same rule must be applied to mere surface water not gathered into a stream.

To give the landowner the absolute and unqualified right of disposition of such water would in many instances be productive of great mischief to his neighbors and lead to interminable struggles between them; for the same power to deal with such water would exist in each landowner when it was on his land. In many instances the water would assume so much of the character of a natural watercourse as to make the application of such a doctrine odious and unjust, while at the same time a total want of power to modify such flow to meet the necessities of the landowner would often stand in the way of valuable improvements which might be made without serious detriment to any one.

The doctrine which we maintain adapts itself to the ever varying circumstances of each particular case, from that which makes a near approach to a natural watercourse down by imperceptible gradations to the case of mere percolation, giving to each landowner, while in the reasonable use and improvement of his land, the right to make reasonable modifications of the flow of such water in and upon his land. In determining this question all the circumstances of the case would of course be considered; and among them the nature and importance of the improvements sought to be made, the extent of the interference with the water, and the amount of injury done to the other landowners as compared with the value of such improvements, and also whether such injury could or could not have been reasonably foreseen.

Ordinarily a landowner may dig a well upon his own land, even though by percolation it draws the water from his neighbor's land, or even his well; but it would present a very different question if the well was dug by him with the express purpose of transferring the water in his neighbor's spring or well to his own and knowing that this would be the result. So too the owner of extensive swamp lands, which are the source of a river furnishing valuable mill sites, might reasonably be allowed to drain it by bringing the water into one

channel, when it might be regarded as unreasonable to divert it entirely from its natural course. So also excavations maliciously made in one's own land, with a view to destroy a spring or well in his neighbor's land, could not be regarded as reasonable; and there would be much ground for holding that if the spring or well in his neighbor's land could be preserved without material detriment to the landowner making such excavations, it would be evidence of malice or such negligence as to be equivalent to malice. *Wheatley v. Baugh*, 25 Penn. St. 532.

In the case before us the instructions asked for by the defendant assumed that he had an absolute and unqualified right to dispose of this water as he pleased, while the instructions given assumed that if the state of things proved had existed from time beyond memory the defendant had no right at all to stop the flow of this water over his land and thus cause it to flow over the plaintiff's land. If this was mere surface water not gathered into a watercourse, as we should infer it was from the case, the instructions¹ upon the principles we have stated are erroneous, unless the plaintiff had acquired a right by prescription to have the water flow over the defendant's land. On that point, to constitute a title by prescription there must have been an adverse user under a claim of right for twenty years or more; but here there has been no such user; the defendant has merely permitted the surface water casually on his land to flow off over it. It does not appear that the plaintiff has claimed or exercised a right to discharge the water on his land upon the defendant's land, or that he has ever done any act or put himself in a situation by reason of which the defendant could maintain a suit against him and thus interrupt a process of gaining title by prescription. It is true that some water which had gathered on the plaintiff's land may have passed off in the same way over the defendant's land, but if it did it was by no act of the plaintiff nor under any claim of right by him. So the fact that this water had passed over the defendant's land for more than twenty years does not change its character and make it a watercourse.

In *Wood v. Waud*, 3 Ex. 778, the court holds that the right to watercourses arising from enjoyment is not the same in respect to natural and artificial watercourses; holding that as to the latter the right must depend upon their character, whether of a permanent or temporary nature, and upon the circumstances under which they are created; and by way of illustration say that the flow of water from a drain, for the purpose of agricultural improvements, for twenty years could not give a right to a neighbor so as to preclude the proprietor from altering the level of his drains for the greater improvement of his land.

This precise case arose in *Greatrex v. Heywood*, 8 Ex. 291, and was

¹That is, that the plaintiff could recover if he had enjoyed the flow for twenty years without interruption.

settled in accordance with this doctrine of *Wood v. Waud*. The same doctrine was applied in the case of drains for mining purposes, in *Arkwright v. Gell*, 5 M. & W. 203. In these cases, from the temporary nature of such drains and artificial watercourses, is deduced the inference that the use of the water discharged by them could not have been enjoyed as matter of right. See *Wood v. Waud*, 3 Ex. 778. In the subsequent case of *Rawstron v. Taylor*, 11 Ex. 369, surface water on defendant's land for more than twenty years had flowed over land of the plaintiff into his watercourse, and he had used it; but it was held that plaintiff could maintain no action against defendant for diverting it on his own land.

In respect to water percolating beneath the surface the tendency of the authorities is against acquiring a right by prescription. The use of such water upon one's own land is apparently rightful, and is no such invasion of the rights of the adjoining owner as would enable him to maintain a suit, for it would be impossible to know that he was drawing water from his neighbor's land. Wash. Easements, 384-390, and cases cited. In this respect water that comes to the surface stands on a different footing, and yet in general they are governed by the same rules. There may doubtless be cases where rights may be acquired by user in respect to such surface water, as in the case of eaves-drip; but it can be only when the use is adverse and such as to give notice to the party against whom the right is acquired. In the case before us, however, no right of the defendant was invaded by any act of the plaintiff. He (the defendant) simply permitted the water gathered by the roadside to flow over his land, and so long as he did so he could maintain no action against any one; and we think the plaintiff had gained no right by prescription to have this water flow over the defendant's land, and there must be

A new trial.

CHAPTER XVII.

NUISANCE.

HAUCK *v.* TIDEWATER PIPE LINE CO.

Supreme Court of Pennsylvania, February, 1893. 153 Penn. St. 366.

APPEAL by the defendants from a verdict and judgment against them in an action for damages resulting from nuisance to property. The defendants were a limited partnership company, in the business of laying pipes and carrying oil through the same in the oil region of Pennsylvania. The business relating to the present suit was conducted entirely upon the defendants' premises,—but the oil was brought from elsewhere; and the plaintiffs complained that oil had escaped from the defendants' pipes and percolated into the plaintiffs' land and poisoned the plaintiffs' springs and a mill pond, destroying fish in the latter and making a dwelling-house on the plaintiffs' land unfit for use as such. The defendants had no power to take property by eminent domain.

The defendants contended that they were liable, not for nuisance, but only on proof of negligence. The case turned upon certain alleged errors of the lower court, which are set out in the opinion below.

PAXSON, C. J. . . . The fifth specification alleges that the court below erred in declining to affirm the defendants' fourth point. The point was as follows:

"That the defendant is not liable for damages resulting from its business by reason of oil escaping from its own lands where it is being handled, except such oil escapes through negligence of the company or its agents."

This point presents the main feature of the case. The court below refused it, upon the ground that it was a question of nuisance and not of negligence, citing *Pottstown Gas Company v. Murphy*, 39 Pa. 257, in support of this view. In that case it was held that the gas company was answerable for consequential damages, such as the corruption of the plaintiff's ground and well, by the fluids percolating from the works; and that a corporation is exempt from consequential damages only where, being clothed with the State's right of eminent domain, it takes private property for public use upon making proper compensation, and where such damages are not part of the compensation required.

We think the learned judge was right under the authority above

cited, in holding that this was not a case of negligence, but of nuisance or of consequential damages. For this reason we think that the case of *The Railroad Company v. Lippincott*, 116 Pa. 472, and of *Railroad Company v. Marchant*, 119 Pa. 559, have no application. The railroad companies in those cases were clothed with the right of eminent domain, and were expressly authorized by law to construct their roads and operate them. It was held therefore that any injury resulting from such operation, without negligence and without malice, was *damnum absque injuria*. In the case in hand the company was clothed with no such powers.

We think the case closely resembles that of *Robb v. Carnegie*, 145 Pa. 324, in which it was held that the owners of coke ovens, the gases from which injured the growing crops upon the adjoining farm, were liable in damages to the owner of said farm for such injury. An attempt was made in that case, as it has been made in this, to bring it within the doctrine of *Pennsylvania Coal Company v. Sanderson*, 113 Pa. 126. In the latter case the injuries complained of were the natural and necessary result of the development by the owner of the resources of his own land. In opening a drift for the purpose of mining coal, the mine water, impregnated with the impurities which it had taken up from the earth, coal and other minerals in the mines, either flowed from the mouth of the drift, or was pumped from the mines, and allowed to take its natural course on its way to the ocean. It will thus be seen that the flow of mine water was the natural and necessary result of the development by the owner of his own property. This was not the case in *Robb v. Carnegie*, nor is it the case here. In *Robb v. Carnegie* the refuse coal which was used for making coke was not mined upon the premises of the company, but was brought from other mines at a distance. In the case in hand the oil which was the cause of the injury to the plaintiffs' property was brought from a distance, allowed to escape from the pipes and to percolate through plaintiff's land and destroy his springs. It was not in any sense a natural and necessary development of the land owned by the company.

The appellants attempted to distinguish this case from *Robb v. Carnegie* by the fact that in the latter case the smoke and gases from the works were carried by the wind and lodged upon the plaintiffs' land; while in the latter [sic, for present] case the escaping oil merely percolated through the soil until it reached plaintiff's springs. The essential difference between being carried through the air and percolating through the soil has not been made to appear. We regard it as a distinction without a difference.

As was correctly said by the learned judge in a portion of his charge embraced in the tenth specification: "If the mere fact that the business is a lawful business, and has been conducted with care, would be a defence where a neighbor's land had been injured in consequence of

the business carried on there, the escape of gas, for instance, or the escape of oil, the result would be that a man might lose his farm, — might be compelled to leave it, and have no compensation, simply because the business which brought about this loss was a lawful business and was carried on carefully. That is not the law. No man's property can be taken, directly or indirectly, without compensation, under the law of this State. Hence there are cases, and a great many of them, where a defendant is held liable in damages, although his business is lawful and he has exercised care in carrying it on."

In the consideration of this class of cases care must be taken to distinguish between the natural and necessary development of the land itself and injuries resulting from the character of some business not incident and necessary to the development of the land or the minerals or other substances lying within it. The owner of the land has the right to develop it by digging for coal, iron, gas, oil, or other minerals, and if in the progress of this development an injury occurs to the owner of adjoining land, without fault or negligence on his part, an action for such injury cannot be maintained. If this were not so, a man might be utterly deprived of the use of his property. It is not so where the injury is caused by the prosecution of a business which has no necessary relation to the land itself, and is not essential to its development.

Judgment affirmed.

ST. HELEN'S SMELTING CO. v. TIPPING.

House of Lords of England, 1865. 11 H. L. Cas. 642.

THIS was an action brought by the plaintiff to recover damages for injuries done to his trees and crops by the defendants' works. The defendants are the directors and shareholders of the St. Helen's Copper-Smelting Company (limited). The plaintiff, in 1860, purchased a large portion of the Bold Hall estate, consisting of the manor-house and about 1,300 acres of land, within a short distance of which stood the works of the defendants. The declaration alleged that "the defendants erected, used, and continued to use, certain smelting works upon land near to the said dwelling-house and lands of the plaintiff, and caused large quantities of noxious gases, vapors, and other noxious matter to issue from the said works and diffuse themselves over the land and premises of the plaintiff, whereby the hedges, trees, shrubs, fruit, and herbage were greatly injured; the cattle were rendered unhealthy, and the plaintiff was prevented from having so beneficial a use of the said land and premises as he would otherwise have enjoyed; and also the revisionary lands and premises were depreciated in value." The defendants pleaded not guilty.

The cause was tried before Mr. Justice Mellor, at Liverpool, in August, 1863, when the plaintiff was examined, and spoke distinctly to the damage done to his plantations, and to the very unpleasant nature of the vapors, which, when the wind was in a particular direction, affected persons as well as plants in his grounds. On cross-examination, he said he had seen the defendant's chimney before he purchased the estate, but he was not aware whether the works were then in operation. On the part of the defendants, evidence was introduced to show that the whole neighborhood was studded with manufactories and tall chimneys; that there were some alkali works close by the defendant's works; that the smoke from one was quite as injurious as the smoke from the other; that the smoke of both sometimes united; and that it was impossible to say to which of the two any particular injury was attributable. The fact that the defendant's works existed before the plaintiff bought the property was also relied on.

The learned judge told the jury that an actionable injury was one producing sensible discomfort; that every man, unless enjoying rights obtained by prescription or agreement, was bound to use his own property in such a manner as not to injure the property of his neighbors; that there was no prescriptive right in this case; that the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and, therefore, in an action for nuisance to property, arising from noxious vapors, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it; that when the jurors came to consider the facts, all the circumstances, including those of time and locality, ought to be taken into consideration; and that with respect to the latter it was clear that in countries where great works had been erected and carried on, persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance, for if so, the business of the whole country would be seriously interfered with.

The defendant's counsel submitted that the three questions which ought to be left to the jury were, "whether it was a necessary trade; whether the place was a suitable place for such a trade; and whether it was carried on in a reasonable manner." The learned judge did not put the questions in this form, but did ask the jury whether the enjoyment of the plaintiff's property was sensibly diminished, and the answer was in the affirmative; whether the business there carried on was an ordinary business for smelting copper, and the answer was, "We consider it an ordinary business, and conducted in a proper manner, in as good a manner as possible." But to the question whether the jurors thought that it was carried on in a proper place, the answer was, "We do not." The verdict was therefore entered for the plaintiff, and the damages were assessed at £361 18s. 4½*d.* A motion was made for a new trial on the ground of misdirection, but the rule was refused. 4 Best & S. 608. Leave was, however, given to appeal, and

the case was carried to the Exchequer Chamber, where the judgment was affirmed. 4 Best & S. 616.

The judges were summoned, and Mr. Baron Martin, Mr. Justice Willes, Mr. Justice Blackburn, Mr. Justice Keating, Mr. Baron Pigott, and Mr. Justice Shce attended.

After the argument, the Lord Chancellor (Lord Westbury) proposed these questions to the judges: "Whether directions given by the learned judge at nisi prius to the jury were correct? or, Whether a new trial ought to be granted in this case?"

Upon a short consultation among the judges, Mr. Baron Martin answered that the directions were correct, being such as had been given in cases of this kind for the last twenty years.

THE LORD CHANCELLOR. My lords, I think your Lordships will be satisfied with the answer we have received from the learned judges to the questions put by this House.

My lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that trade or occupation or business is a material injury to property, then there unquestionably arises a very different consideration. I think, my lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors, would not apply to circumstances the immediate result of which is sensible injury to the value of the property.

Now, in the present case it appears that the plaintiff purchased a very valuable estate, which lies within a mile and a half from certain

large smelting works. What the occupation of these copper-smelting premises was anterior to the year 1860 does not clearly appear. The plaintiff became the proprietor of an estate of great value in the month of June, 1860. In the month of September, 1860, very extensive smelting operations began on the property of present appellants, in their works at St. Helen's. Of the effect of the vapors exhaling from those works upon the plaintiff's property, and the injury done to his trees and shrubs, there is abundance of evidence in the case.

My lords, the action has been brought upon that, and the jurors have found the existence of the injury; and the only ground upon which your lordships are asked to set aside that verdict and to direct a new trial is this, that the whole neighborhood where these copper-smelting works were carried on is a neighborhood more or less devoted to manufacturing purposes of a similar kind, and, therefore, it is said that inasmuch as this copper smelting is carried on in what the appellant contends is a fit place, it may be carried on with impunity, although the result may be the utter destruction, or the very considerable diminution, of the value of the plaintiff's property. My lords, I apprehend that that is not the meaning of the word "suitable," or the meaning of the word "convenient," which has been used as applicable to the subject. The word "suitable" unquestionably cannot carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighboring property. Of course, my lords, I except cases where any prescriptive right has been acquired by a lengthened user of the place.

On these grounds, therefore, shortly, without dilating further upon them (and they are sufficiently unfolded by the judgment of the learned judges in the court below), I advise your lordships to affirm the decision of the court below, and to refuse the new trial, and to dismiss the appeal, with costs.

LORD CRANWORTH. My lords, I entirely concur in opinion with my noble and learned friend on the woolsack, and also in the opinion expressed by the learned judges, that this has been considered to be the proper mode of directing a jury, as Mr. Baron Martin said, for at least twenty years; I believe I should have carried it back rather further. In stating what I always understood the proper question to be, I cannot do better than adopt the language of Mr. Justice Mellor. He says, "It must be plain that persons using a lime-kiln, or other works which emit noxious vapors, may not do an actionable injury to another, and that any place where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law, a convenient place." I always understood that to be so; but in truth, as was observed in one of the cases by the learned judges, it is extremely difficult to lay down any actual definition of what constitutes an injury; because it is always a question of

compound facts, which must be looked to, to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comfort of life and enjoyment of property.

I perfectly well remember, when I had the honor of being one of the barons of the Court of Exchequer, trying a case in the county of Durham, where there was an action for injury arising from smoke in the town of Shields. It was proved incontestably that smoke did come and in some degree interfere with a certain person; but I said, "You must look at it, not with a view to the question whether, abstractly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields;" because, if it only added in an infinitesimal degree to the quantity of smoke, I held that the state of the town rendered it altogether impossible to call that an actionable nuisance.

There is nothing of that sort, however, in the present case. It seems to me that the distinction, in matters of fact, was most correctly pointed out by Mr. Justice Mellor, and I do not think he could possibly have stated the law, either abstractly or with reference to the facts, better than he has done in this case.

LORD WENSLEYDALE. My lords, I entirely agree in opinion with both my noble and learned friends in this case. In these few sentences I think everything is included. The defendants say, "If you do not mind, you will stop the progress of works of this description." I agree that it is so; because, no doubt, in the county of Lancaster, above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights, and allow a person to say, "I will bring an action against you for this and that, and so on." Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment, or value of the property which is affected.

My lords, I do not think the question could have been more correctly laid down by any one to the jury, and I entirely concur in the propriety of dismissing this appeal.

Judgment of the Exchequer Chamber affirming the judgment of the Court of Queen's Bench affirmed, and appeal dismissed, with costs.

CHAPTER XVIII.

DAMAGE BY ANIMALS.

MAY v. BURDETT.

Queen's Bench of England, Trinity Term, 1846. 9 Q. B. 101.

CASE. The declaration stated that defendant, "before and at the time of the damage and injury hereinafter mentioned to the said Sophia, the wife of the said Stephen May, wrongfully and injuriously kept a certain monkey, he the defendant well knowing that the said monkey was of a mischievous and ferocious nature, and was used and accustomed to attack and bite mankind, and that it was dangerous and improper to allow the said monkey to be at large and unconfined: which said monkey, whilst the defendant kept the same as aforesaid, heretofore and before the commencement of this suit, to wit, on the 2d of September, 1844, did attack, bite, wound, lacerate, and injure the said Sophia, then and still being the wife of said Stephen May, whereby the said Sophia became and was greatly terrified and alarmed, and became and was sick, sore, lame and disordered, and so remained and continued for a long time, to wit, from the day and year last aforesaid, to the time of the commencement of this suit; whereby, and in consequence of the alarm and fright occasioned by the said monkey, so attacking, biting, wounding, lacerating, and injuring her as aforesaid, the said Sophia has been greatly injured in her health," &c.

Plea, not guilty. Issue thereon.

On the trial, before Wightman, J., at the sittings in Middlesex, after Hilary Term, 1845, a verdict was found for the plaintiff with £50 damages. Cockburn, in the ensuing term, obtained a rule to show cause why judgment should not be arrested. *Cur. adv. vult.*

LORD DENMAN, C. J. This was a motion to arrest the judgment in an action on the case for keeping a monkey which the defendant knew to be accustomed to bite people, and which bit the female plaintiff. The declaration stated that the defendant wrongfully kept a monkey, well knowing that it was of a mischievous nature, and used and accustomed to attack and bite mankind, and that it was dangerous to allow it to be at large; and that the monkey, whilst the defendant kept the same as aforesaid, did attack, bite, and injure the female plaintiff, whereby, &c.

It was objected, on the part of the defendant, that the declaration was bad for not alleging negligence or some default of the defendant

in not properly or securely keeping the animal; and it was said that, consistently with this declaration, the monkey might have been kept with due and proper caution, and that the injury might have been entirely occasioned by the carelessness and want of caution of the plaintiff herself.

A great many cases and precedents were cited upon the argument; and the conclusion to be drawn from them appears to us to be, that the declaration is good upon the face of it; and that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities.

The precedents, both ancient and modern, with scarcely an exception, merely state the ferocity of the animal and the knowledge of the defendant, without any allegation of negligence or want of care. A great many were referred to upon the argument, commencing with the Register and ending with *Thomas v. Morgan*, 2 Cro. M. & R. 496, s. c. 5 Tyr. 1085, and all in the same form, or nearly so. In the Register, 110, 111, two precedents of writs are given, one for keeping a dog accustomed to bite sheep, and the other for keeping a boar accustomed to attack and wound other animals. The cause of action, as stated in both these precedents, is the propensity of the animals, the knowledge of the defendant, and the injury to the plaintiff; but there is no allegation of negligence or want of care. In the case of *Mason v. Keeling*, 12 Mod. 332, s. c. 1 Ld. Raym. 606, much relied upon on the part of the defendant, want of due care was alleged, but the *scienter* was omitted; and the question was, not whether the declaration would be good without the allegation of want of care, but whether it was good without the allegation of knowledge, which it was held that it was not. No case was cited in which it had been decided that a declaration stating the ferocity of the animal and the knowledge of the defendant was bad for not averring negligence also; but various dicta in the books were cited to show that this is an action founded on negligence, and therefore not maintainable unless some negligence or want of care is alleged.

In Comyns's Digest, tit. Action upon the Case for Negligence (A 5), it is said that "an action upon the case lies for a neglect in not taking care of his cattle, dog," &c.; and passages were cited from the older authorities, and also from some cases at *nisi prius*, in which expressions were used showing that, if persons suffered animals to go at large, knowing them to be disposed to do mischief, they were liable in case any mischief actually was done; and it was attempted to be inferred from this that the liability only attached in case they were suffered to go at large or to be otherwise ill secured. But the conclusion to be

drawn from an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and that, if it does mischief, negligence is presumed without express averment. The precedents, as well as the authorities, fully warrant this conclusion. The negligence is in keeping such an animal after notice. The case of *Smith v. Pelah*, 2 Stra. 1264, and a passage in 1 Hale's Pleas of the Crown, 430,¹ put the liability on the true ground. It may be that, if the injury was solely occasioned by the wilfulness of the plaintiff after warning, that may be a ground of defence by plea in confession and avoidance; but it is unnecessary to give any opinion as to this; for we think that the declaration is good upon the face of it, and shows a *prima facie* liability in the defendant.

It was said indeed, further, on the part of the defendant, that, the monkey being an animal *feræ naturæ*, he would not be answerable for injuries committed by it, if it escaped and went at large without any default on the part of the defendant, during the time it had so escaped and was at large, because at that time it would not be in his keeping nor under his control; but we cannot allow any weight to this objection; for, in the first place, there is no statement in the declaration that the monkey had escaped, and it is expressly averred that the injury occurred while the defendant kept it. We are besides of opinion, as already stated, that the defendant, if he would keep it, was bound to keep it secure at all events.

The rule therefore will be discharged.

Rule discharged.

ELLIS v. LOFTUS IRON CO.

Common Pleas of England, November, 1874. L. R. 10 C. P. 10.

APPEAL from the County Court of Glamorganshire. The case as stated on appeal was as follows: The action was brought to recover £50 for injuries to the plaintiff's mare caused by the defendants' negligence. The plaintiff was the occupier of a farm in the parish of Llansarran, and by arrangements between the plaintiff's landlord,

¹ After stating that "If a man have a beast, as a bull, cow, horse, or dog, used to hurt people, If the owner knew not his quality, he is not punishable," &c., Hale adds (citing authorities) that "these things seem to be agreeable to law:

"1. If the owner have notice of the quality of his beast and it doth anybody hurt, he is chargeable with an action for it.

"2. Though he have no particuler notice that he did any such thing before, yet if it be a beast that is *feræ naturæ*, as a lion, a bear, a wolf, yes, an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I know it adjudged in Andrew Baker's Case, whose child was bit by a monkey that broke his chain and got loose.

"3. And therefore in case of such a wild beast, or in case of a bull or cow that doth damage, where the owner knows of it, he must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damage." 1 Hale's P. C. 430, part 1, c. 33.

the plaintiff, and the defendants, a portion of a field of the plaintiff's farm was let to the defendants for the execution of certain works, and a plot was fenced in by the defendants by means of a wire fencing. The plaintiff's land, which adjoined the part taken by defendants, was used by him as grazing land for horses and cattle, to the knowledge of the defendants.

The defendants were possessed of a stallion used by them as a draft cart-horse; and on Sunday the 18th of August, this horse was turned into the plot occupied by the defendants. The plaintiff had full knowledge of the condition of the fence surrounding it. The mare grazed in the remaining portion of the field adjoining that portion occupied by the defendants. The defendants' horse had been turned out on former occasions on the same plot and had always been watched. The horse of the defendants and one of the plaintiff's mares got close together on either side of the wire fence, and the horse by biting and kicking the mare through the fence committed the injury complained of, the damage being taken at £15.

It was proved that the defendants' horse did not trespass on the land of the plaintiff by crossing the fence. Both animals were close to the fence when the injury happened. There was no evidence that the horse was of a vicious temper or had bitten or kicked any animal before; on the contrary it was stated that the horse was as quiet in temper as you would ever wish a horse. The plaintiff had warned the defendants to keep the horse away from his mares.

The judge being of opinion that there was no trespass, and that the damage was too remote, held that there was no case for the jury. The question for this court was, whether the plaintiff was entitled to recover from the defendants for the injuries caused as aforesaid.

LORD COLERIDGE, C. J. The judgment of the County Court judge must, I think, be reversed, on the ground that there was evidence of a trespass, and the damages were not too remote. I cannot say I entertain any doubt in the matter. It is clear that in determining the question of trespass or no trespass, the court cannot measure the amount of the alleged trespass; if the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it. It has moreover been held, again and again, that there is a duty on a man to keep his cattle in, and if they get on another's land it is a trespass; and that is irrespective of any question of negligence whether great or small. In this case it is found that there was an iron fence on the plaintiff's land, and that the horse of the defendants did damage to that of the plaintiff through the fence. It seems to me sufficiently clear that some portion of the defendants' horse's body must have been over the boundary. That may be a very small trespass, but it is a trespass in law.

The only remaining question is, whether the damages were too

remote. I cannot see that they were; they were the natural and direct consequence of the trespass committed. These considerations would dispose of the case, but apart from any technicalities of law it seems to me that the merits are in the plaintiff's favor. It appears that a piece of land was railed off for the defendants' convenience, and the plaintiff being in the habit of keeping mares on the adjoining land previous to the accident the defendants' stallion had always been watched. Therefore without saying that there was any gross negligence or carelessness on defendants' part, I think there was some default on their part, without which the accident would not have happened. It is not necessary for me to discuss the authorities that have been cited at length. I will only say that *Lee v. Riley*, 18 C. B. N. S. 722; 34 L. J. C. P. 212, is a very strong authority for our present decision. For these reasons I am of opinion that our judgment should be for the plaintiff.

KEATING, J. I am of the same opinion. The County Court judge appears to have held that the facts as stated did not amount to evidence of an actionable wrong on the part of the defendants. There seems to me, however, to be abundant evidence that the defendants' horse committed a trespass for which the defendants are liable.

The horse, it is found, kicked and bit the mare through the fence. I take it that the meaning of that must be that the horse's mouth and feet protruded through the fence over the plaintiff's land, and that would in my opinion amount in law to a trespass. If evidence of negligence was necessary to constitute a trespass in this case, in my opinion there is abundant evidence of negligence on the defendants' part, and none on that of the plaintiff. The defendants erected the fence and turned the horse into the field for their own convenience; they had ample warning with respect to the danger, and in consequence of such warning they had the horse watched on previous occasions, but failed to do so on the occasion when the damage was caused.

BRETT, J. I must confess I did entertain some doubt on this matter. The questions are whether there was any evidence of a trespass on the plaintiff's land for which the defendants would be liable, and if there was then whether the damage is too remote. I had no doubt that if there was evidence of negligence, and as a result of such negligence an animal of the defendants passed wholly or in part on to the plaintiff's land such a circumstance would constitute a trespass; but what I did doubt for some time was whether, where there was no negligence at all on the part of the defendants, the same consequence would follow.

Having looked into the authorities, it appears to me that the result of them is that, in the case of animals trespassing on land, the mere act of the animal belonging to a man, which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act, if done by himself, would have been a tres-

pass. Blackstone, 16th ed. vol. iii. c. 12, p. 211; Chitty, Pleading, 7th ed. vol. i. p. 98; and Comyns' Digest, title Trespass, C, are all authorities to this effect. If, however, it were necessary that there should be evidence of negligence, I cannot say that I should go the length that my brother Keating did, in saying that there was abundant evidence of negligence, though I think there was some evidence. That would be sufficient to support our judgment in any view of the law; but I put my judgment on the ground that by law there was a trespass in this case without evidence of negligence. That being so, the question remains whether the damages were too remote. The case of *Lee v. Riley* is a distinct authority to the contrary; and the American case of *Vandenburgh v. Truax*, 4 Denio, 464, quoted in the notes to *Vicars v. Wilcocks*, 2 Smith's L. C. p. 499, 6th ed., is to the same effect.

DENMAN, J. I rather agree with my brother Brett as to the amount of evidence of negligence in this case. I am by no means clear that there was such evidence of negligence as, if it was necessary to prove negligence, would have properly entitled the plaintiff to a verdict. The County Court judge appears to have nonsuited the plaintiff on the ground that there was no trespass, and the damages were too remote. Now during the early part of the argument I thought it a very strong thing to say that whenever any part of an animal passed over or through a fence, inasmuch as the same act, if done by a man, might technically be a trespass, therefore there was a trespass on the part of the owner of the animal. But after hearing the authorities cited, and especially the case of *Lee v. Riley*, and the passages from Comyns' Digest and Chitty on Pleading, it appears to me that they undoubtedly bear out that view.

It seems hard, when two parties have adjoining lands with a fence between them, and a quarrel arises between the animals on either side of the fence, one party should be liable for the consequences, though not in reality guilty of default or neglect any more than the other, by reason of the application to the mere act of an animal of the technical rule "*cujus est solum ejus est usque ad cælum*." I must say, however, that I cannot see, upon the authorities, any escape from the conclusion that it must be so.

The only remaining point is whether the damages were too remote. As to that I agree with the rest of the court that the case of *Lee v. Riley* is conclusive.

Judgment for the plaintiff.

NOTE: Compare *Millen v. Faudrye*, Poph. 161; *Glenham v. Hanby*, 1 Ld. Raym. 739; *Mason v. Keeling*, id. 608, dictum attributed to Lord Holt; and note to the original report of the principal case.

DECKER v. GAMMON.

Supreme Court of Maine, 1857. 44 Maine, 322.

THIS is an action on the case, to recover the value of a horse, alleged to have been injured by the defendant's horse, and comes forward on exceptions to the rulings of Goodenow, J.

The plaintiff introduced evidence tending to prove that at night, on the 13th of September, 1855, he put his horse into his field well and uninjured. The next morning, September 14th, his horse and the defendant's were together in his, the plaintiff's close, the defendant's horse having, during the night, escaped from the defendant's enclosure, or from the highway, into the close of the plaintiff, and that the plaintiff's horse was severely injured by the defendant's horse, by kicking, biting, or striking with his fore feet, or in some other way, so that he died in a few days after.

The defendant requested the presiding judge to instruct the jury that to entitle the plaintiff to recover against the defendant he must prove, in addition to other necessary facts, that the defendant's horse was vicious, and that the defendant had knowledge of such viciousness prior to the time of the alleged injury.

The presiding judge declined giving these instructions, and directed the jury, that, if they should find that the defendant owned the horse alleged to have done the injury to the plaintiff's horse, and if, at the time of the injury, he had escaped into the plaintiff's close, and was wrongfully there, and while there occasioned the injury, and that the horse died in consequence, that the plaintiff would be entitled to recover the value of the horse so injured. That it was not necessary for the plaintiff to prove that the horse was vicious, or accustomed to acts of violence towards other animals or horses, or that the owner had notice of such viciousness or habits.

The jury returned a verdict for the plaintiff.

DAVIS, J. There are three classes of cases in which the owners of animals are liable for injuries done by them to the persons or the property of others. And in suits for such injuries the allegations and proofs must be varied in each case, as the facts bring it within one or another of these classes.

1. The owner of wild beasts, or beasts that are in their nature vicious, is, under all circumstances, liable for injuries done by them. It is not necessary, in actions for injuries by such beasts, to allege or prove that the owner knew them to be mischievous, for he is conclusively presumed to have such knowledge; or that he was guilty of negligence in permitting them to be at large, for he is bound to keep them in at his peril.

"Though the owner have no particular notice that he did any

such thing before, yet if he be a beast that is *feræ naturæ*, if he get loose and do harm to any person, the owner is liable to an action for the damage." 1 Hale, P. C., 430.

"If they are such as are naturally mischievous in their kind, in which the owner has no valuable property, he shall answer for hurt done by them, without any notice; but if they are of a tame nature, there must be notice of the ill quality." HOLT, C. J. *Mason v. Keeling*, 12 Mod. R. 332.

"The owner of beasts that are *feræ naturæ* must always keep them up, at his peril; and an action lies without notice of the quality of the beasts." *Rex v. Huggins*, 2 Lord Raym., 1583.

2. If domestic animals, such as oxen and horses, injure any one, in person or property, if they are rightfully in the place where they do the mischief, the owner of such animals is not liable for such injury, unless he knew that they were accustomed to do mischief. And in suits for such injuries, such knowledge must be alleged, and proved. For unless the owner knew that the beast was vicious, he is not liable. If the owner had such knowledge he is liable.

"The gist of the action is the keeping of the animal after knowledge of its vicious propensities." *May v. Burdett*,¹ 58 Eng. C. L., 101.

"If the owner have knowledge of the quality of his beast, and it doth anybody hurt, he is chargeable in an action for it." 1 Hale P. C., 430.

"An action lies not unless the owner knows of this quality." *Buxendin v. Sharp*, 2 Salk. 662.

"If the owner puts a horse or an ox to grass in his field, and the horse or ox breaks the hedge, and runs into the highway, and gores or kicks some passenger, an action will not lie against the owner unless he had notice that they had done such a thing before." *Mason v. Keeling*, 12 Modern R. 332.

"If damage be done by any domestic animal, kept for use or convenience, the owner is not liable to an action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief." *Vrooman v. Lawyer*, 13 Johns. R. 339.

3. The owner of domestic animals, if they are wrongfully in the place where they do any mischief, is liable for it, though he had no notice that they had been accustomed to do so before. In cases of this kind the ground of the action is, that the animals were wrongfully in the place where the injury was done. And it is not necessary to allege or prove any knowledge on the part of the owner, that they had previously been vicious.

"If a bull break into an enclosure of a neighbor, and there gore a horse so that he die, his owner is liable in an action of trespass *quare clausum fregit*, in which the value of the horse would be the

¹ Ante, p. 592.

just measure of damages." *Dolph v. Ferris*, 7 Watts & Searg. R. 367.

"If the owner of a horse suffers it to go at large in the streets of a populous city, he is answerable in an action on the case, for a personal injury done by it to an individual, without proof that he knew that the horse was vicious. The owner had no right to turn the horse loose in the streets." *Goodman v. Gay*, 3 Harris R. 188. In this case the writ contained the allegation of knowledge on the part of the defendant; but the court held that it was not material, and need not be proved.

The case before us is clearly within this class of cases last described. It is alleged in the writ that "the plaintiff had a valuable horse which was peaceably and of right depasturing in his own close, and the defendant was possessed of another horse, vicious and unruly, which was running at large where of right he ought not to be; and being so unlawfully at large, broke into the plaintiff's close, and injured the plaintiff's horse, &c." It is also alleged that "the vicious habits of the horse were well known to the defendant;" but this allegation was not necessary, and may well be treated as surplusage. If the defendant had had a right to turn his horse upon the plaintiff's close, it would have been otherwise. But if the horse was wrongfully there, the defendant was liable for any injury done by him, though he had no knowledge that the horse was vicious. The gravamen of the charge was, that the horse was wrongfully upon the plaintiff's close; and this was what was put in issue by the plea of not guilty.

Nor are these principles in conflict with the decision in the case of *Van Lenven v. Lyke*, 1 Comstock, 515. In that case the action was not sustained, because the declaration was not for trespass quare clausum, with the other injuries alleged by way of aggravation. But in that case there was no allegation that the animal was wrongfully upon the plaintiff's close; or that the injury was committed upon the plaintiff's close. 4 Denio R. 127. And in the Court of Appeals it was expressly held, that "if the plaintiff had stated in his declaration that the swine broke and entered his close, and there committed the injury complained of, and sustained his declaration by evidence, he would have been entitled to recover all the damages thus sustained." 1 Coms. 515, 518.

In the case before us, though the declaration is not technically for trespass quare clausum, it is distinctly alleged that the defendant's horse, "being so unlawfully at large, broke and entered the plaintiff's close, and injured the plaintiff's horse," which was there peaceably and of right depasturing. This was sufficient; and the instruction given to the jury, "that if the defendant's horse, at the time of the injury, had escaped into the close, and was wrongfully there, and while there occasioned the injury, then the plaintiff would be

entitled to recover," was correct. And this being so, the instruction requested, "that the plaintiff must prove, in addition to other necessary facts, that the defendant's horse was vicious, and that the defendant had knowledge of such viciousness prior to the time of the injury," was properly refused.

Exceptions overruled.

CUTTING, J., did not concur.

CHAPTER XIX.

ESCAPE OF DANGEROUS THINGS.

RYLANDS *v.* FLETCHER.

House of Lords of England, July, 1868. L. R. 3 H. L. 330.

THIS was a proceeding in error against a judgment of the Exchequer Chamber, which had reversed a previous judgment of the Court of Exchequer.

In November, 1861, Fletcher brought an action against Rylands & Horrocks to recover damages for an injury caused to his mines by water overflowing into them from a reservoir which the defendants had constructed. The declaration contained three counts, each count alleging negligence on the part of the defendants, but in this House the case was ultimately treated upon the principle of determining the relative rights of the parties independently of any question of personal negligence by the defendants in the exercise of them.

The cause came on for trial at the Liverpool Summer Assizes of 1862, when it was referred to an arbitrator, who was afterwards directed, instead of making an award, to prepare a special case for the consideration of the judges. This was done, and the case was argued in the Court of Exchequer in Trinity Term, 1865.

The material facts of the case were these: The plaintiff was the lessee of certain coal mines known as the Red House Colliery, under the Earl of Wilton. He had also obtained from two other persons, Mr. Hulton and Mr. Whitehead, leave to work for coal under their lands. The positions of the various properties were these: There was a turnpike road leading from Bury to Bolton, which formed a southern boundary to the properties of these different persons. A parish road, called the Old Wood Lane, formed their northern boundary. These roads might be described as forming two sides of a square, of which the other two sides were formed by the lands of Mr. Whitehead on the east and Lord Wilton on the west. The defendants' grounds lay along the turnpike road, or southern boundary, stretching from its centre westward. On these grounds were a mill and a small old reservoir. The proper grounds of the Red House Colliery also lay in part along the southern boundary, stretching from its centre eastward. Immediately north of the defendants' land lay the land of Mr. Hulton, and still further north that of Lord Wilton. On this land of Lord Wilton the defendants in 1860 constructed (with

his lordship's permission) a new reservoir, the water from which would pass almost in a southerly direction across a part of the land of Lord Wilton and the land of Mr. Hulton, and so reach the defendants' mill. The line of direction from this new reservoir to the Red House Colliery mine was nearly southeast.

The plaintiff, under his lease from Lord Wilton, and under his agreements with Messrs. Hulton and Whitehead, worked the mines under their respective lands. In the course of doing so he came upon old shafts and passages of mines formerly worked but of which the workings had long ceased. The origin and the existence of these shafts and passages were unknown. The shafts were vertical, the passages horizontal; and the former especially seemed filled with marl and rubbish. Defendants employed for the purpose of constructing their new reservoir persons who were admitted to be competent as engineers and contractors to perform the work, and there was no charge of negligence made against the defendants personally. But in the course of excavating the bed of the new reservoir five old shafts, running vertically downwards, were met with in the portion of the land selected for its site. The case found that "on the part of the defendants there was no personal negligence or default whatever, in or about, or in relation to, the selection of the said site, or in or about the planning or construction of the said reservoir; but in point of fact reasonable and proper care and skill were not exercised by or on the part of the persons so employed by them with reference to the shafts so met with as aforesaid, to provide for the sufficiency of the said reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear."

The reservoir was completed at the beginning of December, 1860, and on the morning of the 11th of that month, being then partially filled with water, one of the aforesaid vertical shafts gave way, and burst downwards, in consequence of which the water of the reservoir flowed into the old passages and coal-workings underneath, and by means of the underground communications then existing between them and the plaintiff's workings in the Red House Colliery the colliery was flooded and the workings thereof stopped.

The question for the opinion of the court was whether the plaintiff was entitled to recover damages by reason of the matters hereinbefore stated. The Court of Exchequer, Mr. Baron Bramwell dissenting, gave judgment for the defendants. 3 H. & C. 774. That judgment was afterwards reversed in the Court of Exchequer Chamber, 4 H. & C. 263; L. R. 1 Ex. 265. The case was then brought on error to this House.

THE LORD CHANCELLOR (Lord Cairns). My lords, in this case the plaintiff (I may use the description of the parties in the action) is the occupier of a mine and works under a close of land. The defendants are the owners of a mill in his neighborhood, and they pro-

posed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land which, for the purposes of this case, may be taken as being adjoining to the close of the plaintiff, although in point of fact some intervening land lay between the two. Underneath the close of land of the defendants, on which they proposed to construct their reservoir, there were certain old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish; and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the plaintiff of his mine he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the defendants.

In that state of things the reservoir of the defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally the defendants appear to have taken no part in the works or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned.¹ However, my lords, when the reservoir was constructed, and filled or partly filled with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings, and from the horizontal workings under the close of the defendants it passed on into the workings under the close of the plaintiff and flooded his mine, causing considerable damage, for which this action was brought.

The Court of Exchequer, when the special case stating the facts to which I have referred was argued, was of opinion that the plaintiff had established no cause of action. The Court of Exchequer Chamber, before which an appeal from this judgment was argued, was of a contrary opinion, and the judges there unanimously arrived at the conclusion that there was a cause of action, and that the plaintiff was entitled to damages.

My lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be

¹As to the relation of the contractor and the engineer to the plaintiff see *Hillard v. Richardson*, 3 Gray, 349. See also *Boomer v. Wilbur*, ante, p. 163.

used; and if in what I may term the natural user of that land there had been any accumulation of water, either on the surface or underground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving or by interposing some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature. As an illustration of that principle I may refer to a case which was cited in the argument before your lordships, the case of *Smith v. Kenrick*, 7 C. B. 515, in the Court of Common Pleas.

On the other hand if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land,—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if in the course of their doing it the evil to which I have referred, the evil namely of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequences of that, in my opinion, the defendants would be liable. As the case of *Smith v. Kenrick* is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same court, the case of *Baird v. Williamson*, 15 C. B. N. S. 317, which was also cited in the argument at the bar.

My lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles referred to by Mr. Justice Blackburn in his judgment in the Court of Exchequer Chamber, where he states the opinion of that court as to the law in these words: “We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff’s default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose

grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued; and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenchess."

My lords, in that opinion I must say I entirely concur. Therefore I have to move your lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

LORD CRANWORTH. My lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert v. Bessey*, reported by Sir Thomas Raymond.¹ And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes however innocently damage to another, it is obviously only just that he should be the party to suffer. He is bound "*sic uti suo ut non laedat alienum.*" This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it.

The doctrine appears to me to be well illustrated by the two modern cases in the Court of Common Pleas referred to by my noble and learned friend. I allude to the two cases of *Smith v. Kenrick* and *Baird v. Williamson*. In the former the owner of a coal mine on the

¹ T. Raym. 421. But on the generality of this language compare *Voegler v. City of North Vernon*, ante, p. 25.

higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint. The defendant, the owner of the upper mine, had a right to remove all his coal. The damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata. There was no obligation on the defendant to protect the plaintiff against this. It was his business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water that it should not impede him in his workings. The water, in that case, was only left by the defendant to flow in its natural course.

But in the later case of *Baird v. Williamson* the defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially he pumped up quantities of water which passed into the plaintiff's mine in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without negligence, and in the due working of his own mine, yet he was held to be responsible for the damage so occasioned. It was in consequence of his act, whether skilfully or unskilfully performed, that the plaintiff had been damaged, and he was therefore held liable for the consequences. The damage in the former case may be treated as having arisen from the act of God; in the latter from the act of the defendant.

Applying the principle of these decisions to the case now before the House, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The plaintiff had a right to work his coal through the lands of Mr. Whitehead, and up to the old workings. If water naturally rising in the defendants' land (we may treat the land as the land of the defendants for the purpose of this case) had by percolation found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the plaintiff, he would have done no more than he was entitled to do; for according to the principle acted on in *Smith v. Kenrick*, the person working the mine, under the close in which the reservoir was made, had a right to win and carry away all the coal without leaving any wall or barrier against Whitehead's land. But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff; and for that damage, however skilfully and

carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible.

I concur therefore with my noble and learned friend in thinking that the judgment below must be affirmed, and that there must be judgment for the defendant in error.

*Judgment of the Court of Exchequer Chamber affirmed.*¹

LOSEE v. BUCHANAN.

Court of Appeals of New York, January, 1873. 51 N. Y. 476.

ACTION for damages caused by the explosion of a boiler on the premises of defendant corporation, the Saratoga Paper Company, and injuring property belonging to the plaintiff. With the corporation the plaintiff had joined certain persons who as trustees and stockholders were interested in the same, and also certain persons named Clute who had made the boiler. Against the Clutes negligence was alleged; while the others were treated by the plaintiff as liable without negligence. The rest of the case appears in the opinion of the court.

EARL, C.² Upon the first trial of this action, the presiding judge dismissed the complaint as against the defendants Clute, who manufactured the engine, and held that the other defendants were liable irrespective of negligence, and excluded all evidence to show that they were not guilty of negligence. For this error, upon appeal to the General Term, the judgment was reversed and new trial granted, the court holding that the defendants could be made liable only by proof against them of negligence. Upon the second trial, the presiding judge held, in accordance with the law as thus laid down by the General Term, and upon the question of negligence the jury decided against the Saratoga Paper Company and in favor of the other two defendants. The plaintiff claimed, as he did upon the first trial, that the defendants were liable without the proof of any negligence, and requested the justice so to rule, and the refusal of the justice to comply with this request raises the principal question for our consideration upon this appeal.

Upon the last appeal, the majority of the court held the law to be as it had been held upon the first appeal, but a new trial was granted for certain alleged errors in the charge of the justice, which will hereafter be considered. The claim on the part of the plaintiff is, that the casting of the boiler upon his premises by the explosion was a direct trespass upon his right of undisturbed pos-

¹ See discussion of this case by Doe, J., in *Brown v. Collins*, 53 N. H. 442.

² Commissioner of appeals, under special statute.

session and occupation of his premises, and that the defendants are liable just as they would have been for any other wrongful entry and trespass upon his premises. I do not believe this claim to be well founded, and I will briefly examine the authorities upon which mainly an attempt is made to sustain it.

In *Farrand v. Marshall*, 21 Barb. 409, it was held that a man may dig on his own land, but not so near that of his neighbor as to cause the land of the latter to fall into his pit, thus transferring a portion of another man's land to his own. This is upon the principle that every man has the natural right to the use of his land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots. He has a right to the support of the adjoining soil, and to that extent has an easement in his neighbor's soil, and when the soil is removed his easement has been interfered with. Where one adjoining owner thus removes the soil, he is not doing simply what he may with his own, but he is interfering with the right which his neighbor has in the same soil. This rule, however, as stated by Judge Bronson in *Radcliff's Executors v. Mayor*, etc., of Brooklyn, 4 Comst. 203, must undoubtedly be somewhat modified in its application to cities and villages. In *Hay v. The Cohoes Company*, 2 Comst. 159, the defendant, a corporation, dug a canal upon its own land for the purposes authorized by its charter. In so doing it was necessary to blast rocks and gunpowder, and the fragments were thrown against and injured the plaintiff's dwelling upon lands adjoining. It was held that the defendant was liable for the injury, although no negligence or want of skill in executing the work was alleged or proved. This decision was well supported by the clearest principles. The acts of the defendant in casting the rocks upon plaintiff's premises were direct and immediate. The damage was the necessary consequence of just what the defendant was doing, and it was just as much liable as if it had caused the rocks to be taken by hand, or any other means, and thrown directly upon plaintiff's land. This is far from an authority for holding that the defendants, who placed a steam-boiler upon their lands, and operated the same with care and skill, should be liable for the damages caused by the explosion, without their fault or any direct or immediate act of theirs. It is true that Judge Gardner, in writing the opinion of the court, lays down broadly the principle that "every individual is entitled to the undisturbed possession and lawful enjoyment of his own property," citing the maxim *sic utere tuo*, etc. But this principle, as well as the maxim, as will be seen, has many exceptions and limitations, made necessary by the exigencies of business and society.

In *Bellinger v. The New York C. R. R. Co.*, 23 N. Y. 47, it was decided that where one interferes with the current of a running stream, and causes damage to those who are entitled to have the water flow in its natural channel, but such interference is in pursuance

of legislative authority granted for the purpose of constructing a work of public utility, upon making compensation he is liable only for such injury as results from the want of due skill and care in so arranging the necessary works as to avoid any danger reasonably to be anticipated from the habits of the stream and its liability to floods. Judge Denio, in his opinion, referring to the maxim *aqua currit et debet currere*, says, it "absolutely prohibits an individual from interfering with the natural flow of water to the prejudice of another riparian owner upon any pretence, and subjects him to damages at the suit of any party injured without regard to any question of negligence or want of care." The liability in such cases is based upon the principle that the interference is an immediate and direct violation of the right of the other riparian owners to have the water flow in its natural channel. No one has an absolute property in the water of a running stream. He may use it, but he must not, by his use of it, interfere with the equal right which other riparian owners have also to use it, and have it flow in its natural way in its natural channel.

In *Pixley v. Clark*, 35 N. Y. 520, it was held, that if one raises the water in a natural stream above its natural banks, and to prevent its outflow constructs embankments which answer the purpose perfectly, but by the pressure of the water upon the natural banks of the stream percolation takes place so as to drain¹ the adjoining lands of another, an action will lie for the damages occasioned thereby; and that it matters not whether the damage is occasioned by the overflow of or the percolation through the natural banks, so long as the result is occasioned by an improper interference with the natural flow of the stream. This decision was an application of the maxim *aqua currit et debet currere* to the facts of that case. It was held that the liability was the same whether the water was dammed up and caused to overflow or to percolate through the banks of the stream. It was a case of flooding lands by damming up the water of a stream, and the liability of a wrong-doer in such a case has never been disputed.

In the case of *Selden v. The Delaware and Hudson Canal Co.*, 24 Barb. 362, it was held that the defendant had the power, under its charter, to enlarge its canal; but that, though it possessed this power, and upon making compensation therefor, to take private property for that purpose, it was liable to remunerate individuals in damages for any injuries they might sustain as the consequence of such improvement; and that, if by means of the enlargement, a lawful act in itself, the lands of an individual were inundated, even though the work may have been performed with all reasonable care and skill, it was a legal injury, for which the owner was entitled to redress. It may well be doubted if this decision can stand in view of the prin-

¹ Sic, for drown.

ciples laid down in the case of *Bellinger v. The New York Central Railroad Company*, supra. Within the principles of that case, if the Delaware and Hudson Canal Company exercised a power conferred upon it by law in a lawful and proper manner, it could not be held liable for the consequential damages necessarily occasioned to the owners of adjoining lands. But if we assume, as was assumed at the General Term in that case, that the defendant did not have the protection of the law for the damages which it occasioned, then it was clearly liable. Its acts were necessarily and directly injurious to the plaintiff. It kept the water in its canal when it knew that the necessary consequence was to flood the plaintiff's premises. The damage to plaintiff was not accidental, but continuous, direct, and necessary. In such a case the wrong-doer must be held to have intended the consequence of his acts, and must be treated like one keeping upon his premises a nuisance doing constant damage to his neighbor's property.

In the case of *McKeon v. Lee*, 4 Rob. Superior Court R., 449, it was held, that the defendant had no right to operate a steam-engine and other machinery upon his premises so as to cause the vibration and shaking of plaintiff's adjoining buildings to such an extent as to endanger and injure them. This case was decided upon the law of nuisances. It was held that the engine and machinery, in the mode in which they were operated, were a nuisance, and the decision has been affirmed at this term of the court. The decision in this case, and in scores of similar cases to be found in the books, is far from an authority that one should be held liable for the accidental explosion of a steam boiler which was in no sense a nuisance. We are also cited to a class of cases holding the owners of animals responsible for injuries done by them. There is supposed to be a difference as to responsibility between animals *mansuetae naturae* and *ferae naturae*. As to the former, in which there can be an absolute right of property, the owner is bound at common law to take care that they do not stray upon the lands of another, and he is liable for any trespass they may commit, and it is altogether immaterial whether their escape is purely accidental or due to negligence. As to the latter, which are of a fierce nature, the owner is bound to take care of them and keep them under control, so that they can do no injury. But the liability in each case is upon the same principle. The former have a known, natural disposition to stray, and hence the owner knowing this disposition is supposed to be in fault if he do not restrain them and keep them under control. As to the former, the owner is not responsible for such injuries as they are not accustomed to do, by the exercise of vicious propensities which they do not usually have, unless it can be shown that he has knowledge of the vicious habit and propensity. As to all animals, the owner can usually restrain and keep them under control, and if he will keep them he must do so. If

he does not, he is responsible for any damage which their well-known disposition leads them to commit. I believe the liability to be based upon the fault which the law attributes to him, and no further actual negligence need be proved than the fact that they are at large unrestrained. But if I am mistaken as to the true basis of liability in such cases, the body of laws in reference to live animals, which is supposed to be just and wise, considering the nature of the animals and the mutual rights and interests of the owners and others, does not furnish analogies absolutely controlling in reference to inanimate property.

Blackstone (vol. 3, p. 209) says, "that whenever an act is directly and immediately injurious to the person or property of another, and therefore necessarily accompanied with some force, an action of trespass *vi et armis* will lie;" for "the right of *meum* and *tuum* or property in lands being once established, it follows as a necessary consequence that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil. Every entry, therefore, thereon without the owner's leave, and especially contrary to his express order, is a trespass or transgression." The learned author was here laying down the distinction between an action of trespass and trespass on the case, and asserting the rule that in the former action the injury must be direct and immediate, and accompanied with some force, whereas in the latter action it could be indirect and consequential. He was also manifestly speaking of a direct entrance by one upon the lands of another. He was laying down a general rule that every unauthorized entrance upon the land of another is a trespass. This was sufficiently accurate for the enunciation of a general rule. Judges and legal writers do not always find it convenient, practicable, or important, in laying down general rules, to specify all the limitations and exceptions to such rules. The rule, as thus announced, has many exceptions, even when one makes a personal entry upon the lands of another. I may enter my neighbor's close to succor his beast whose life is in danger; to prevent his beasts from being stolen or to prevent his grain from being consumed or spoiled by cattle; or to carry away my tree which has been blown down upon his land, or to pick up my apples which have fallen from my trees upon his land, or to take my personal property which another has wrongfully taken and placed there, or to escape from one who threatens my life. Bacon's Abridgment, Trespass, F. Other illustrations will be given hereafter.

By becoming a member of civilized society, I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender by every other man of the same rights, and the security, advantage, and protection which the laws give me. So, too, the general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real

estate as not to injure my neighbor, are much modified by the exigencies of the social state. We must have factories, machineries, dams, canals, and railroads. They are demanded by the manifold wants of mankind, and lie at the basis of all our civilization. If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. He receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things upon his lands. I may not place or keep a nuisance upon my land to the damage of my neighbor, and I have my compensation for the surrender of this right to use my own as I will by the similar restriction imposed upon my neighbor for my benefit. I hold my property subject to the risk that it may be unavoidably or accidentally injured by those who live near me; and as I move about upon the public highways and in all places where other persons may lawfully be, I take the risk of being accidentally injured in my person by them without fault on their part. Most of the rights of property, as well as of person, in the social state, are not absolute but relative, and they must be so arranged and modified, not unnecessarily infringing upon natural rights, as upon the whole to promote the general welfare.

I have so far found no authorities and no principles which fairly sustain the broad claim made by the plaintiff, that the defendants are liable in this action without fault or negligence on their part to which the explosion of the boiler could be attributed.

But our attention is called to a recent English case, decided in the Exchequer Chamber, which seems to uphold the claim made. In the case of *Fletcher v. Rylands*, 1 Ex. 265, Law Reports,¹ the defendants constructed a reservoir on land separated from the plaintiff's colliery by intervening land. Mines under the site of the reservoir and under part of the intervening land had been formerly worked, and the plaintiff had, by working lawfully, made in his own colliery and in the intervening land an underground communication between his colliery and the old workings under the reservoir. It was not known to the defendants, nor to any person employed by them in the construction of the reservoir, that such communication existed, or that there were any old workings under the site of the reservoir, and the defendants were not personally guilty of any negligence; but, in fact, the reservoir was constructed over five old shafts, leading down to the workings. On the reservoir being filled, the water burst down these shafts and flowed, by the underground communication, into the plaintiff's mines. It was held, reversing the judgment of the Court of Exchequer, that the defendants were liable for the damage so caused, upon the broad doctrine that one who, for his own purposes, brings upon his land, and collects and keeps there, anything

¹ Ante, p. 602.

likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. Mr. Justice Blackburn, writing the opinion of the court, says: "The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbors; but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more;" and he reaches the conclusion that it is an absolute duty, and that the liability for damage from the escape attaches without any proof of negligence. This conclusion is reached by the learned judge mainly by applying to the case the same rule of liability to which owners are subjected by the escape of their live animals. As I have shown above, the rules of law applicable to live animals should not be applied to inanimate property. That case was appealed to the House of Lords and affirmed. 3 H. L. [Law Rep.] 330,¹ and was followed in *Smith v. Fletcher*, 20 W. R. 987.

It is sufficient, however, to say that the law, as laid down in those cases, is in direct conflict with the law as settled in this country. Here, if one builds a dam upon his own premises and thus holds back and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or the banks of the reservoir give way and the lands of a neighbor are thus flooded, he is not liable for the damage without proof of some fault or negligence on his part. Angell on Water-courses, § 336; *Lapham v. Curtis*, 5 Vt. 371; *Todd v. Cochell*, 17 Cal. 97; *Everett v. Hydraulic, etc., Co.*, 23 Id. 225; *Shrewsbury v. Smith*, 12 Cush. 177; *Livingston v. Adams*, 8 Cowen, 175; *Bailey v. Mayor, etc., of New York*, 3 Hill, 531, s. c. 2 Denio, 433; *Pixley v. Clark*, 35 N. Y. 520, 524; *Sheldon v. Sherman*, 43 Id. 484.

The true rule is laid down in the case of *Livingston v. Adams* as follows: "Where one builds a mill-dam upon a proper model, and the work is well and substantially done, he is not liable to an action though it break away, in consequence of which his neighbor's dam and mill below are destroyed. Negligence should be shown in order to make him liable."

In conflict with the rule as laid down in the English cases is a class of cases in reference to damage from fire communicated from

¹ Ante, p. 602.

the adjoining premises. Fire, like water or steam, is likely to produce mischief if it escapes and goes beyond control; and yet it has never been held in this country that one building a fire upon his own premises can be made liable if it escapes upon his neighbor's premises and does him damage without proof of negligence. *Clark v. Foot*, 8 J. R. 422; *Stuart v. Hawley*, 22 Barb. 619; *Calkins v. Barger*, 44 Id. 424; *Lansing v. Stone*, 37 Id. 15; *Barnard v. Poor*, 21 Pick. 378; *Tourtellot v. Rosebrook*, 11 Met. 460; *Batchelder v. Heagan*, 18 Maine, 32. The rule, as laid down in *Clark v. Foot*, is as follows: "If A. sets fire to his own fallow ground, as he may lawfully do, which communicates to and fires the woodland of B., his neighbor, no action lies against A. unless there was some negligence or misconduct in him or his servant." And this is the rule throughout this country except where it has been modified by statute. *Tourtellot v. Rosebrook* was an action to recover damages caused by a fire communicated to the plaintiff's land from a coal-pit which the defendant lawfully set on fire upon his own land, and it was held that the burden was on the plaintiff to prove negligence on the part of the defendant. In *Hinds v. Barton*, 25 N. Y. 544, and *Teall v. Barton*, 40 Barb. 137, sparks were emitted from a steam-dredge used upon the Erie Canal, and they set fire to neighboring buildings, and although the sparks were thrown directly upon the buildings it was held that the defendant could be made liable only by proof of negligence. In *Cook v. The Chamberlain Transportation Co.*, 1 Denio, 91, the buildings of the plaintiff were fired by sparks thrown thereon from defendant's steamboat upon Lake Champlain, and it was held that the defendant could be made liable only by proof of negligence. All these cases and the class of cases to which they belong are in conflict with the rule as claimed by the plaintiff. A man may build a fire in his house or his steam-boiler, and he does not become liable without proof of negligence if sparks accidentally pass directly from his chimney or smoke-stack to the buildings of his neighbor. The maxim of *sic utere tuo*, etc., only requires, in such a case, the exercise of adequate skill and care.

The same rule applies to injuries to the person. No one in such case is made liable without some fault or negligence on his part, however serious the injury may be which he may accidentally cause; and there can be no reason for holding one liable for accidental injuries to property when he is exempt from liability for such injuries to the person. It is settled in numerous cases, that if one driving along a highway accidentally injures another he is not liable without proof of negligence. *Center v. Finney*, 17 Barb., 94; *Hammock v. White*, 103 Eng. Com. Law, 587.

In *Harvey v. Dunlop*, *Lalor's Supplement*,¹ 193, the action was for throwing a stone at the plaintiff's daughter and putting out her

¹ Hill & Denio.

eye. It did not appear that the injury was inflicted by design or carelessness, but did appear that it was accidental, and the court held that the plaintiff could not recover, laying down the broad rule that no liability results from the commission of an act arising from inevitable accident, or which ordinary human care and foresight could not guard against. In *Dygert v. Bradley*, 8 Wend. 469, the action was for running one boat against another in the Erie canal, and the court held that if the injury was occasioned by unavoidable accident, no action would lie for it; but if any blame was imputable to the defendant, he would be liable. In *Brown v. Kendall*, 6 Cush. 292,¹ the defendant having interfered to part his dog and the plaintiff's, which were fighting, in raising his stick for that purpose, accidentally struck the plaintiff and severely injured him; it was held that he was not liable. In writing the opinion of the court, Chief Justice Shaw says: "It is frequently stated by judges, that where one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question whether trespass and not case will lie, assuming that the facts are such that some action will lie. These dicta are no authority, we think, for holding that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional or careless." "We think, as the result of all the authorities, that the rule is that the plaintiff must come prepared with evidence to show either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable and the conduct of the defendant was free from blame, he will not be held liable. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom." So, too, contrary to what was held in an early English case, if one raise a stick in self-defence to defend himself against an assault and accidentally hit a third person, he cannot, in my opinion, be made liable for the injury thus, without fault or negligence, inflicted.

In *Rockwood v. Wilson*, 11 Cush. 221, Mr. Justice Thomas says: "Nothing can be better settled than that if one do a lawful act upon his own premises, he cannot be held responsible for injurious consequences that may result from it, unless it was so done as to constitute actionable negligence."

In *Bissell v. Booker*, 16 Ark. 308, it was held that one who is hunting in a wilderness is not bound to anticipate the presence, within range of his shot, of another man, and that he is not liable for an injury caused unintentionally by him to a person of whose presence he was not aware. See also the cases of *Driscoll v. The Newark and Rosendale Co.*, 37 N. Y. 637.

In *Spencer v. Campbell*, 9 Watts & S. 32, a man drove a horse

¹ *Ante*, p. 301.

to defendant's steam grist-mill to get some grist which he had had ground, and he was thus lawfully upon defendant's premises and was just as much entitled to protection there as if he had been upon his own premises. While there the steam-boiler exploded and killed his horse, and the action was brought for the value of the horse; and it was held that, to entitle the plaintiff to recover, he was bound to show the want of ordinary care, skill and diligence. I am unable to see how that case differs in principle from the one at bar. To sustain the broad claim of the plaintiff here, it should have been held in that case that the owner of the steam-boiler was absolutely liable, irrespective of any care, skill or diligence on his part, for any damage which the boiler by its explosion occasioned to any property lawfully in the vicinity. Within the rules laid down by these authorities, the defendants in this case could not, without proof of negligence, be made liable for injuries caused to the persons of those who were near at the time of the explosion; and it would be quite illogical to hold them liable for injuries to property, while they were not liable for injuries to persons by the same accident.

In support of the plaintiff's claim in this action the rule has been invoked that, where one of two innocent parties must suffer, he who puts in motion the cause of the injury must bear the loss. But, as will be seen by the numerous cases above cited, it has no application whatever to a case like this.

This examination has gone far enough to show that the rule is, at least in this country, a universal one, which, so far as I can discern, has no exceptions or limitations, that no one can be made liable for injuries to the person or property of another without some fault or negligence on his part. In this case the defendants had the right to place the steam-boiler upon their premises. It was in no sense a nuisance, and the jury have found that they were not guilty of any negligence. The judgment in their favor should, therefore, have been affirmed at the General Term, unless there were errors in the charge, or refusal to charge, of the judge who presided at the trial, and these alleged errors I will now briefly examine.

It is alleged that the judge erred in charging the jury that "defendants are not liable for negligence or want of skill on the part of the manufacturers of the boiler in question not known to them;" "that defendants are not liable except upon proof of negligence or unskilfulness on the part of the authorized servants or agents of the company;" "that there is no proof of any relation between the plaintiff and defendant, Buchanan, creating any obligation or duty on the part of the latter toward the former;" "that defendant, Buchanan, is not liable for any negligence or unskilfulness on the part of the Saratoga Company or on the part of the manufacturers of the boiler in question." These are not found in the charge, but were decisions made upon the motion for a nonsuit, and were not excepted to.

The judge charged the jury "that if they were of opinion that the reduction by Goddard (the engineer and agent of the paper company, who had charge of the boiler) of the steam pressure from 120 to 110 was a proper, prudent and sufficient exercise of care and skill under the circumstances, that the defendants were not liable on account of leakage;" "that the cold shut in the head that previously gave out was no evidence of the cold shut in the head that did give out;" "that if Goddard told Bullard that it would be prudent to run the steam-boiler at 110, and if Bullard believed that and acted upon it, then he was not liable;" "that if the jury found from the evidence that Goddard came to the conclusion that to reduce the pressure from 120 to 110 would render the use of the boiler prudent and safe, and communicated that idea to Bullard, he, Bullard, was not personally liable." These charges were excepted to by plaintiff's counsel. These were requests to charge on the part of the defendants acceded to by the judge. Some of them should properly have been somewhat qualified and explained, and are therefore liable to some criticism. But we must look at the whole charge, and judge of it from its whole scope, and if, taking it all together, it presented the questions of law fairly to the jury so as not to mislead them, exceptions to separate propositions in it, or to detached portions of it, will not be upheld. As said by Chief Judge Church, in *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282, "If the charge as a whole conveyed to the jury the correct rule of law, on a given question, the judgment will not be reversed although detached sentences may be erroneous; and if the language employed is capable of different constructions, that construction will be adopted which will lead to an affirmance of the judgment, unless it fairly appears that the jury were, or at least might have been, misled."

The judge in his charge submitted the whole question of negligence to the jury. He charged that the defendants were liable for the omission of such care as men of ordinary prudence engaged in the use of such a steam-boiler in such business would exercise, and that they were liable for any imperfections in the boiler, which contributed to the explosion, which were known to them; but that if the explosion was caused by the cold shut in the head of the boiler which was imperceptible to the defendants or undiscoverable on examination or by the application of known tests, they were not liable. He charged the jury fully in reference to the leakage of the boiler, and his charge upon that subject was fully as favorable to the plaintiff as he could claim. He called the attention of the jury to all the facts connected with it and to what Goddard had told Bullard about it, and stated to them that they had a right to say, from all the facts, whether or not Bullard was chargeable with negligence in the use of the boiler, under the circumstances. I think, from the charge as made, the jury could not have failed to understand that the defendants were

to be held liable for any defects in the manufacture of the boiler which they knew or ought to have known, and for any negligence in the use of the boiler which could be attributed to them.

The plaintiff requested the court to charge "that the defendants cannot excuse or justify themselves in the use of the boiler in question, on the ground that the same was purchased of reputable manufacturers." This the judge refused to charge and the plaintiff excepted. The principle of law involved in this request was fairly covered by the charge as made, and yet it may well be doubted whether the judge would have been justified in charging in the language of the request. The fact that the defendants bought the boiler of reputable manufacturers was one of the facts tending to a justification which the jury were to consider. It was not of itself a conclusive justification, and the judge did not charge that it was. If he had refused to charge that they could not justify on the sole ground that they had purchased it of reputable manufacturers, it would have been error. A charge in the very language of the request might have misled the jury by taking from their consideration the fact that the boiler was bought from reputable manufacturers upon whose judgment, skill and integrity the defendants had the right to place some reliance.

I have, therefore, reached the conclusion that no error was committed upon the trial of this action, and it follows that the order of the General Term must be reversed, and the judgment entered upon the verdict must be

Affirmed, with costs.

WILSON v. NEW BEDFORD.

Supreme Court of Massachusetts, October, 1871. 108 Mass. 261.

THE case is stated in the opinion of the court.

CHAPMAN, C. J. The act of 1863, c. 163, for supplying the city of New Bedford with pure water, grants authority to the city to exercise the right of eminent domain by taking the land and streams therein named, erecting dams and laying water pipes. By § 6, the city is made liable to pay all damages that shall be sustained by any persons in their property by the taking of land, water or water rights, or by the construction of any dams, aqueducts, reservoirs, or other works for the purposes of the act. This provision is in conformity with the tenth article of the Declaration of Rights; and both the grant of authority and the obligation to make compensation are to have a reasonable interpretation.

The city has taken the stream mentioned in the petition, and erected a dam across it, thereby creating a reservoir. The petitioner

alleges that this reservoir has caused damage to him by reason of the percolation of water from the reservoir, underground, to his house cellar and barn cellar, about a thousand feet distant from the dam, and alongside of it, and preventing the natural passage of water underground into the natural stream on which the dam is constructed. The respondents contend that they are not liable to make compensation for an injury of this character.

It is true that the rights of neighboring proprietors of lands in underground waters which remain still, or naturally percolate through the soil without forming channels, are very different from their rights in watercourses. The percolating water belongs to the owner of the land, as much as the land itself, or the rocks and stones in it. Therefore he may dig a well, and make it very large, and draw up the water, by machinery or otherwise, in such quantities as to supply aqueducts for a large neighborhood. He may thus take the water which would otherwise pass by natural percolation into his neighbor's land, and draw off the water which may come by natural percolation from his neighbor's land; and his neighbor may, by a wall or other obstruction, retain the water which is upon his own land, and prevent the water from coming into his soil. This principle was discussed in *Greenleaf v. Francis*, 18 Pick. 117; and afterwards in *Chasemore v. Richards*, 7 H. of L. Cas. 349; and also in several other cases in England and this country. But the present case is of a different character. The respondents have so raised their dam and reservoir as to cause an artificial pressure of the water through the soil, and by its action it has flooded the petitioner's cellars. Probably it cannot be ascertained precisely how it acts underground.

In this Commonwealth, complaints under our mill acts have for many years presented cases quite similar to this. Lands are overflowed by mill ponds, and instead of an action at common law a process is provided by statute for the recovery of damages, quite similar to the process in this case. The question what kind of damages should be estimated has been discussed and settled in several cases. In *Monson & Brimfield Manufacturing Co. v. Fuller*, 15 Pick. 554, it was decided that damages occasioned by the percolation of water through the earth from the pond to neighboring uplands, and causing them to produce poorer grass, or a smaller quantity of grass, could be recovered. In *Fuller v. Chicopee Manufacturing Co.*, 16 Gray, 46, it was decided that damages occasioned by raising the pond, so as to affect injuriously the water of the plaintiff's well, were recoverable; and no distinction was made as to whether it affected the well by overflowing or percolation. This principle is just; for the water often injures land which it never overflows; and where the soil is porous, the water may by percolation render a dwelling house uninhabitable, or destroy the value of large tracts of land. Upon the same principle, it was held in *Ball v. Nye*, 99 Mass. 582,

that it was actionable to cause filthy water to percolate from the defendant's vault through his own soil and thence into his neighbor's soil, and thus injure his neighbor's well and cellar. In *Pixley v. Clark*, 35 N. Y., 520, the same principle was held in regard to water which percolates through the banks of a reservoir created by erecting a dam across a stream, and damages the plaintiff's land. *Rylands v. Fletcher*, Law Rep. 3 H. of L. 330,¹ affirming the decision of the Exchequer Chamber, states the same principles, in application to a reservoir created artificially, from which the water flowed through some passages apparently filled up, and long disused, into the plaintiff's mine. Lord Cranworth, in delivering his opinion, said: "If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage." He distinguishes between natural percolations and that which is caused artificially. On this point he says: "If water naturally rising in the defendant's land had by percolation found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint." "But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skilfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible."

The cases cited from Vermont are, to some extent, in apparent conflict with these authorities. They do not seem to distinguish, as these authorities do, between natural and artificial causes of injury. We think the petitioner's claim is not only sustained by authority, but is founded on justice. He ought to be compensated for such an injury as the petition describes, and the law would be defective if it failed to give him a remedy.

Case to stand for trial.

¹ Ante, p. 602.

PART III.

CHAPTER XX.

COMMON ASPECTS OF THE SPECIFIC TORTS.

1. CONSENT.

SHINGLEMEYER *v.* WRIGHT.

Supreme Court of Michigan, May, 1900. 124 Mich. 230.

ACTION for slander and false imprisonment. There was evidence for the plaintiff that she went to the defendant's office and that the defendant there charged her with larceny of his bicycle; that she telephoned several times to the police station and asked that an officer be sent over; that no officer was sent from the police station and the plaintiff left the defendant's office and went down the elevator, and near the door met a policeman whom she brought back to the defendant's office; that she told the officer that the defendant had accused her of stealing his wheel, and that she wanted to see whether he could do so; that upon the plaintiff's return to the defendant's office with the officer, the plaintiff asked the defendant to repeat his statement. The plaintiff's evidence further tended to show that the defendant did accuse her of stealing his wheel in the officer's presence; that thereupon the officer told her that she had to go along with him. The plaintiff was subsequently released from arrest. The evidence for the defendant was upon all material questions opposed to that of the plaintiff. There was a verdict for the plaintiff, and the defendant brings a writ of error.

LONG, J. . . . [after stating the facts and discussing questions of pleading and evidence the court proceeded:] In regard to the statement by defendant in the presence of the officer Henry, it was not a publication for which the law gives a remedy. She herself solicited the statement, and sent for the officer for the express purpose of having the defendant repeat the statement in his presence. It would not have been stated to him except by her invitation. She might have left the defendant's office. She waited some time for the officer to come, and then left, and, meeting the officer as she emerged from the building, came back with him for no other purpose than to ask him to repeat the statement in his presence. In *Christman v. Christman*, 36 Ill. App. 567, plaintiff was suspected of an assault with intent to murder. The defendant suspected the plaintiff, and so stated to

an officer. Plaintiff took one King with him, and went to defendant's house. King asked her, in the presence of plaintiff, if she had any idea who did it, to which defendant replied: "There is only two mean enough to do it, and Johnnie is one of them. Johnnie is the only one that would do it, and he is the one that did do it." Held that plaintiff could not recover.

Where one received a letter containing libellous statements, and himself read the letter to others, held that he could not recover. *Sylvis v. Miller*, 96 Tenn. 94. There is no difference in principle between reading a letter to another and soliciting a person to make a similar verbal statement.

Where one sought from the superintendent of a railroad company a letter of recommendation for his friend, which letter was given, containing a statement that the person had left the service of the company during a strike, held that this was not publishing a libel. *Kansas City, etc., R. Co. v. Delaney*, 102 Tenn. 289. The following cases sustain the same doctrine; *Irish-American Bank v. Bader*, 59 Minn. 329; *Heller v. Howard*, 11 Ill. App. 554; *Fonville v. McNease*, 1 Dud. (S. C.) 303; *King v. Waring*, 5 Esp. 13; *Smith v. Wood*, 3 Camp. 323; *Haynes v. Leland*, 29 Me. 233.

Plaintiff repeatedly testified that she sent for the policeman to see if she did steal his wheel, and that she was going to make him prove it. The maxim, "*Volenti non fit injuria*," applies.

[The court held there was no false imprisonment by the defendant or by his direction.]

The other Justices concurred.

Judgment reversed and no new trial ordered.

GOLDNAMER v. O'BRIEN.

Court of Appeals of Kentucky, January, 1896. 98 Ky. 569.

THE case is stated in the opinion.

HAZELRIGG, J. The appellants were sued by the appellee, Sallie O'Brien, for inducing her to submit to an attempted abortion on her person by a physician procured by them, and judgment was rendered for \$1,700.

If we assume from the proof that the appellants did in any way induce the appellee to resort to this method of hiding her shame, and they deny this most earnestly, it is clear from the testimony that she left her home in Elizabethtown and went to Louisville in search of this relief voluntarily, and alike voluntarily submitted herself to the treatment of a physician.

Her pregnancy was not attributable to either of the appellants and, at most, they may have urged the Louisville trip as the only means

of securing the desired result, and may have furnished money and otherwise assisted the plaintiff in the accomplishment of her purpose. While it is not directly shown that either of them employed or otherwise procured the physician, and such a conclusion is based on the barest inference, yet this question is properly submitted to the jury, and we shall assume such a state of fact.

Waiving other questions, the important one in this appeal is, can the plaintiff maintain this action? Or rather, as the petition avers an abduction and an attempted abortion, against the plaintiff's will and consent, the question is, is she entitled to a judgment upon the state of fact thus assumed to exist, and apparently found to exist by the jury? The right to recover is of course clear unless it is destroyed by the complainant's consent to the assault, and whether this affects the right is a question of much conflicting authority.

It may be stated generally that the suit of a wrongdoer will be rejected when seeking redress for another's having participated with him in the wrong. Thus a woman who immorally yields to her seducer cannot sue because she consented to and participated in the wrong whereof she complains. Bishop on Non-contract Law, section 57; *Cline & Co. v. Templeton*, 78 Ky. 550. The author last quoted further says (section 196) that "rape, one of the most aggravated batteries, is, if the woman consents, neither rape nor even assault," and that "the execution of any unlawful contract places it past annulment, and leaves no right of action in either party against the other. So that, though a mutual beating by consenting parties is a wrong against the public, because a breach of the peace, it is not such as between themselves; since neither can complain of that to which he consented." And the learned author after citing a number of American and English cases to sustain the text adds: "Such is the distinct and inevitable deduction of the reasoning of the law; applicable, however, in all its consequences, only where the beating was not in excess of the consent. But we have American cases in which the judges have overlooked the distinctions between the civil and criminal remedy, and so have held that one may maintain his civil suit for a battery to which he consented and in which he participated. Decisions like these, proceeding on a misapprehension, and overlooking established law not brought to the notice of the judges, should not be followed in future cases."

To the same effect Mr. Roscoe says (1 Ros. Cr. Ev., 306): "In consequence of the natural desire not to permit a flagrant act of immorality to go unpunished, an attempt has frequently been made to treat that as an assault which is consented to on the part of the person who is the subject of the act. But on examination it will be found that there is no authority for such a position."

The author cites numerous authorities supporting the text, but points out that not every act of submission implies consent. Thus,

from the mere submission of a child or person of weak mind, consent is not necessarily to be presumed. In the case at bar, however, it would be too much to say that the act of the complainant was not willingly and intentionally done.

In 1 Wait's Actions and Defenses (page 344, section 11) it is said: "An assault implies force upon one side, and repulsion, or, at least, want of assent on the other. An assault upon a consenting party would, therefore, be a legal absurdity."

On the other hand, Mr. Cooley, in his work on Torts (page 163), says: "Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance, the erection of which was concurred in or countenanced. . . . But in a case of a breach of the peace it is different. The State is wronged by this, and forbids it on public grounds. If men fight, the State will punish them. If one is injured, the law will not listen to an excuse based on a breach of the law. . . . The rule of law is, therefore, clear and unquestionable that consent to an assault is no justification." And one wounded in a duel is said by the learned author to have a cause of action for damages against his adversary, for a consent which the law forbids cannot be accepted as a legal protection. Some of the cases cited by the author, however, are criminal prosecutions, but others support the text.

These authorities seem to be irreconcilable. While we readily appreciate the argument that, so far as the State is concerned, no consent can be pleaded in justification, we have not been able to understand how, in a civil suit, in which the party consenting alone is interested, compensation can be allowed by the law. If both parties to the action are violators of the law, must the mouth of one be closed and the complaint of the other heard? The parties stand on an exact equality before the law, and, if one wrongfully consented to beat another, the other has wrongfully consented to be beaten.

In a late work on this subject it is said: "Harm suffered by consent is not, in general, the basis of a civil action. . . . If the defendant is guilty of no wrong against the plaintiff except a wrong invited and procured by the plaintiff for the purpose of making it the foundation of an action, it would be most unjust that the procurer of the wrongful act should be permitted to profit by it." 1 Jaggard on Torts, 199.

In *Duncan v. Commonwealth*, 6 Dana, 295 (1838), the defendant, to an indictment for an *affray*, pleaded a former conviction under an indictment for an *assault and battery*, and this court said: "As an *affray* is a disturbance of the public peace by a fighting with the mutual consent of the combatants, it would be intrinsically improbable that a conviction for an assault and battery — which would not be authorized unless there had been a trespass without the consent

of the person injured — had been adjudged as a punishment for an act which should be deemed an affray.”

And while in that case and the quotation from Roscoe as well, the law in criminal cases was being considered, and the rule as laid down is not now followed, the authority strongly tends to support the principle that at least the party consenting to the injury cannot profit by his wrongful act.

The instruction, therefore, asked by the appellants that if the plaintiff voluntarily went to Louisville for the purpose of having the alleged abortion performed on her, the law was for the defendants, should have been given.

Judgment reversed for proceedings consistent with this opinion.

2. JUSTIFICATION.

CAMPBELL v. RACE.

Supreme Court of Massachusetts, September, 1852. 7 Cush. 408.

THIS was an action of trespass for breaking and entering the plaintiff's close in the town of Mount Washington, and was tried in the Court of Common Pleas, before Byington, J. The defendant pleaded the general issue, and specified in defence a right of way of necessity, resulting from the impassable state of the adjoining highway, by obstructions with snow.

The defendant introduced evidence that at the time when the trespass was alleged to have been committed he was travelling with his team on a highway running east and west, which led to and intersected a highway running north and south, which latter highway led to and intersected another highway, on which the defendant had occasion to go with his team; and the usual, proper, and only mode of getting on which, by a highway, was by passing over the two highways first named, when they were in a condition fit for travel; but at the time of the alleged trespass, they were both obstructed, and rendered impassable by snow-drifts; because of which obstructions, the defendant turned out of the first highway with his team, at a place where it was rendered impassable as aforesaid, and passed over the adjoining fields of the plaintiff, doing no unnecessary damage, and returned into the second highway, as soon as he had passed the obstructions which rendered both impassable. And he contended, that the highways being thus rendered impassable, he had a way of necessity over the plaintiff's adjoining fields, or that his so passing was excusable, and not a trespass.

But the judge ruled, that these facts constituted no defence to the

action; and a verdict having been returned accordingly for the plaintiff, the defendant alleged exceptions.

BIGELOW, J. It is not controverted by the counsel for the plaintiff, that the rule of law is well settled in England, that where a highway becomes obstructed and impassable from temporary causes, a traveller has a right to go extra viam upon adjoining lands, without being guilty of trespass. The rule is so laid down in the elementary books. 2 Bl. Com. 36; Woolrych on Ways, 50, 51; 3 Cruise Dig. 89; Wellbeloved on Ways, 38; and it is fully supported by the adjudged cases. *Henn's Case*, W. Jones, 296; 3 Salk. 182; 1 Saund. 323, note 3; *Absor v. French*, 2 Show. 28; *Young v. ———*, 1 Id. Raym. 725; *Taylor v. Whitehead*, 2 Doug. 745; *Bullard v. Harrison*, 4 M. & S. 387, 393. Such being the admitted rule of law, as settled by the English authorities, it was urged in behalf of the plaintiff in the present case, that it had never been recognized or sustained by American authors or cases. But we do not find such to be the fact. On the contrary, Mr. Dane, whose great learning and familiar acquaintance with the principles of the common law, and their practical application at an early period in this commonwealth, entitle his opinion to very great weight, adopts the rule, as declared in the leading case of *Taylor v. Whitehead*, ubi supra, which he says "is the latest on the point, and settles the law." 3 Dane Ab. 258. And so Chancellor Kent states the rule. 3 Kent Com. 424. We are not aware of any case in which the question has been distinctly raised and adjudicated in this country; but there are several decisions in New York, in which the rule has been incidentally recognized and treated as well settled law. *Holmes v. Seely*, 19 Wend. 507; *Williams v. Safford*, 7 Barb. 309; *Newkirk v. Sabler*, 9 Barb. 652.¹ These authorities would seem to be quite sufficient to justify us in the recognition of the rule. But the rule itself is founded on the established principles of the common law, and is in accordance with the fixed and uniform usage of the community. Indeed, one of the strongest arguments in support of it is, that it has always been practised upon and acquiesced in, without objection, throughout the New England States. This accounts satisfactorily for the absence of any adjudication upon the question, in our courts, and is a sufficient answer to the objection upon this ground, which was urged upon us by the learned counsel for the plaintiff. When a right has been long claimed and exercised, without denial or objection, a strong presumption is raised, that the right is well founded.

The plaintiff's counsel is under a misapprehension in supposing that the authorities in support of the rule rest upon any peculiar or exceptional principle of law. They are based upon the familiar and well settled doctrine, that to justify or excuse an alleged tres-

¹ Ante, p. 491.

pass, inevitable necessity or accident must be shown. If a traveller in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the travelled paths, so that he cannot reach his destination, without passing upon adjacent lands, he is certainly under a necessity so to do. It is essential to the act to be done, without which it cannot be accomplished. Serious inconveniences, to say the least, would follow, especially in a climate like our own, if this right were denied to those who have occasion to pass over the public ways. Not only would intercourse and business be sometimes suspended, but life itself would be endangered. In hilly and mountainous regions, as well as in exposed places near the sea coast, severe and unforeseen storms not unfrequently overtake the traveller, and render highways suddenly impassable, so that to advance or retreat by the ordinary path, is alike impossible. In such cases, the only escape is, by turning out of the usually travelled way, and seeking an outlet over the fields adjoining the highway. If a necessity is not created, under such circumstances, sufficient to justify or excuse a traveller, it is difficult to imagine a case which would come within the admitted rule of law. To hold a party guilty of a wrongful invasion of another's rights, for passing over land adjacent to the highway, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent, and giving them a protection beyond that which finds a sanction in the rules of law. Such a temporary and unavoidable use of private property, must be regarded as one of those incidental burdens to which all property in a civilized community is subject. In fact, the rule is sometimes justified upon the ground of public convenience and necessity. Highways being established for public service, and for the use and benefit of the whole community, a due regard for the welfare of all requires, that when temporarily obstructed, the right of travel should not be interrupted. In the words of Lord Mansfield, "it is for the general good that people should be entitled to pass in another line." It is a maxim of the common law, that where public convenience and necessity come in conflict with private right, the latter must yield to the former. A person travelling on a highway, is in the exercise of a public, and not a private right. If he is compelled, by impassable obstructions, to leave the way, and go upon adjoining lands, he is still in the exercise of the same right. The rule does not, therefore, violate the principle that individual convenience must always be held subordinate to private rights, but clearly falls within that maxim, which makes public convenience and necessity paramount.

It was urged in argument that the effect of establishing this rule of law would be to appropriate private property to public use without providing any means of compensation to the owner. If such

an accidental, occasional and temporary use of land can be regarded as an appropriation of private property to a public use, entitling the owner to compensation, which may well be doubted, still the decisive answer to this objection is quite obvious. The right to go extra viam, in case of temporary and impassable obstructions, being one of the legal incidents or consequences which attaches to a highway through private property, it must be assumed, that the right to the use of land adjoining the road was taken into consideration and proper allowance made therefor, when the land was originally appropriated for the highway, and that the damages were then estimated and fixed, for the private injury which might thereby be occasioned.

It was also suggested, that the statutes of the commonwealth, imposing the duty on towns to keep public ways in repair, and rendering them liable for damages occasioned by defects therein, furnish ample remedies in cases of obstructions, and do away with the necessity of establishing the rule of the common law in this commonwealth, which gives the right in such cases to pass over adjacent lands. But this is not so. Towns are not liable for damages in those cases to which this rule of the common law would most frequently be applicable—of obstructions, occasioned by sudden and recent causes, which have not existed for the space of twenty-four hours, and of which the towns have had no notice. Besides; the statute liability of towns does not extend to damages such as would ordinarily arise from the total obstruction of a highway; being expressly confined to cases of bodily injuries and damages to property. *St. 1850, c. 5; Canning v. Williamstown, 1 Cush. 451; Harwood v. Lowell, 4 Cush. 310; Brailey v. Southborough, 6 Cush. 141.*

From what has already been said, the limitations and restrictions of the right to go upon adjacent lands in case of obstructions in the highway can be readily inferred. Having its origin in necessity, it must be limited by that necessity; cessante ratione, cessat ipsa lex. Such a right is not to be exercised from convenience merely, nor when, by the exercise of due care, after notice of obstructions, other ways may be selected and the obstructions avoided. But it is to be confined to those cases of inevitable necessity or unavoidable accident, arising from sudden and recent causes which have occasioned temporary and impassable obstructions in the highway. What shall constitute such inevitable necessity or unavoidable accident, must depend upon the various circumstances attending each particular case. The nature of the obstruction in the road, the length of time during which it has existed, the vicinity or distance of other public ways, the exigencies of the traveller, are some of the many considerations which would enter into the inquiry, and upon which it is the exclusive province of the jury to pass, in order to determine whether any necessity really existed, which would justify or excuse the traveller.

In the case at bar, this question was wholly withdrawn from the consideration of the jury, by the ruling of the court. It will therefore be necessary to send the case to a new trial in the court of common pleas.

Exceptions sustained.

KIRBY v. FOSTER.

Supreme Court of Rhode Island, July, 1891. 17 R. I. 437.

THE case is stated in the opinion.

STINESS, J. The plaintiff was in the employ of the Providence Warehouse Co., of which the defendant, Samuel J. Foster, was the agent, and his son, the other defendant, an employee. A sum of fifty dollars belonging to the corporation had been lost, for which the plaintiff, a bookkeeper, was held responsible, and the amount was deducted from his pay. On January 20, 1888, Mr. Foster handed the plaintiff some money to pay the help. The plaintiff, acting under the advice of counsel, took this money the amount due him at the time, including what had been deducted from his pay, put it into his pocket, and returned the balance to Mr. Foster, saying he had received his pay and was going to leave, and that he did this under advice of counsel. The defendants then seized the plaintiff and attempted to take the money from him. A struggle ensued, in which the plaintiff claims to have received injury, for which this suit is brought. The jury having returned a verdict for the plaintiff, the defendants petition for a new trial on exceptions to the rulings and refusals to rule of the presiding justice. It is unnecessary to repeat the several exceptions, since they involve substantially but one question, viz.: whether the defendants were justified in the use of force upon the plaintiff to retake the money from him. As the defendants only pleaded the general issue, all requests relating to justification might properly have been refused on that ground. 1 Chitty on Pleading, 501; 2 Greenleaf on Evidence, s. 92. This case, however, having been tried upon the defence of justification, we will consider the exceptions as though that defence had been pleaded.

The defendants contend that the relation of master and servant subsisted between the plaintiff and Samuel J. Foster, the manager of the warehouse, whereby possession of money by the plaintiff was constructively possession by the manager, acting in behalf of the company; and that the money having been delivered to the plaintiff for the specific purpose of paying the help, his conversion of it to his own use was a wrongful conversion amounting to embezzlement, which justified the defendants in using force in defence of the property under their charge. Unquestionably, if one takes another's

property from his possession without right and against his will, the owner or person in charge may protect his possession, or retake the property, by the use of necessary force. He is not bound to stand by and submit to wrongful dispossession or larceny when he can stop it, and he is not guilty of assault in thus defending his right, by using force to prevent his property from being carried away. But this right of defence and recapture involves two things: first, possession by the owner, and, second, a purely wrongful taking or conversion, without a claim of right. If one has intrusted his property to another, who afterwards, honestly though erroneously, claims it as his own, the owner has no right to retake it by personal force. If he has, the actions of replevin and trover in many cases are of little use. The law does not permit parties to take the settlement of conflicting claims into their own hands. It gives the right of defence but not of redress. The circumstances may be exasperating; the remedy at law may seem to be inadequate; but still the injured party cannot be arbiter of his own claim. Public order and the public peace are of greater consequence than a private right or an occasional hardship. Inadequacy of remedy is of frequent occurrence, but it cannot find its complement in personal violence. Upon these grounds the doctrine contended for by the defendants is limited to the defence of one's possession and the right of recapture as against a mere wrong-doer. It is therefore to be noted in this case that the money was in the actual possession of the plaintiff, to whom it had been intrusted for the purpose of paying help, who thereupon claimed the right to appropriate it to his own payment, supposing he might lawfully do so. Conceding that the advice was bad, nevertheless, upon such appropriation the plaintiff held the money adversely, as his own, and not as the servant or agent of the company. If his possession was the company's possession, then the company was not deprived of its property, and there could be neither occasion nor justification for violence. Possession by the company would be constructive merely, which would cease when the plaintiff exercised dominion and control on his own behalf under an honest claim of right. It is only in this way, in many cases, that conversion is established. Having thus appropriated the money to himself, it is urged that the act amounted to embezzlement, which justified the intervention of the defendants to prevent the consummation of the crime. We do not think this is so. The plaintiff stated what he had done, and the grounds upon which he claimed the right to do it, handing back the balance above what was due him. A controversy followed; he started to go out, but was stopped by the defendants, and then the assault took place. The sincerity of the plaintiff's belief that he had a right to retain the money is unquestionable. Hence, as stated in *Cluff v. Mutual Benefit Life Insurance Co.* 13 Allen, 308, cited by the defendants, even a forcible taking

of property, "if done under an honest claim of right, however ill founded, would not constitute the crime of robbery or larceny; because, where a party sincerely, though erroneously, believes that he is legally justified in taking property, he is not guilty of the felonious intent which is an essential ingredient of these crimes."

In the most favorable view of the case for the defendants, the plaintiff having obtained the money by no crime, misrepresentation, or violence, nor against the will of its owner, retained it wrongfully. In such cases the rule is clearly stated in *Bliss v. Johnson*, 73 N. Y. 529: "The general rule is, that a right of property merely, not joined with the possession, will not justify the owner in committing an assault and battery upon the person in possession for the purpose of regaining possession, although the possession is wrongfully withheld." See, also, *Harris v. Marco*, 16 S. Car. 575; *Barnes v. Martin*, 15 Wisc. 240; *Andre v. Johnson*, 6 Blackf. Ind. 375. In *Commonwealth v. McCue*, 16 Gray, 226, it was held that an owner of cattle, which had been taken up by one who claimed to be a field driver, had no right to commit an assault in retaking his property, even though the complainant acted only as an officer de facto and demanded illegal fees.

But, it is said, the plaintiff was about to carry away the money against the will of the owner. Undoubtedly this was so; but this is true in every case of wrongful conversion of property. If it be not taken against the will of the owner, it cannot be retaken by force, but only by the usual civil remedy.

The defendants cite the following cases, which, it will be seen, are plainly distinguishable from the case at bar. *Blades v. Higgs*, 10 C. B. N. S. 713. This was on demurrer to a plea, which set up that the plaintiff had possession, wrongfully and against the will of the owner, of certain property, which the plaintiff was about to carry away. The plea was held to be a good justification for necessary force, upon the assumed ground that the defendants had actual possession of the chattels, which the plaintiff took against their will. In *Johnson v. Perry*, 56 Vt. 703, and *Gyre v. Culver*, 47 Barb. S. C. 592, there was no claim of right on the part of the plaintiff to the property he had taken. In *Hodgeden v. Hubbard*, 18 Vt. 504, the plaintiff obtained the property by false representations. *Baldwin v. Hayden*, 6 Conn. 453, apparently sustains the defendant's contention that an owner has a right to retake property intrusted to another, if he is about to carry it away; yet it does not appear in that case that the defendant made any claim of title to the paper in question, only that he supposed he had permission to take it away. *State v. Elliott*, 11 N. H. 540, is in the same line, but extremely guarded in expression. It appears to have been a very slight assault, which the court was quite willing to justify, without consideration of authorities. But the court says the right of recapture of property is

far more limited than that of its defence, and recognizes the question whether the person removing it is a mere wrong-doer, as one of the questions to be determined.

The defendants object to the charge of the court, that where a person has come into the peaceable possession of a chattel from another, the latter has no right to retake it by violence, whether the possession is lawful or unlawful, upon the ground that this rule would prevent the recapture of property obtained by trickery or fraud. The instruction must be considered not as an abstract proposition, but with reference to the case before the jury. Nothing appeared to show that the money had been procured by misrepresentation, trickery, or fraud. It was delivered to the plaintiff voluntarily, in the usual course of business. True, under the advice of a lawyer whom he had consulted, the plaintiff had previously determined to apply the money to his own payment when he should receive it; but this did not make the delivery itself fraudulent, nor did his intent to assert what he believed to be his right make that intent criminal. We think, therefore, with reference to the case as it stood, there was no error in the charge as given, nor in the refusals to charge as requested.

Exceptions overruled.

SCRIBNER v. BEACH.

Supreme Court of New York, 1847. 4 Denio, 448.

TRESPASS for assault and battery. Plea, not guilty, with notice of "son assault demesne," and that the assault was committed in defence of defendant's property.

It appeared that the affair which gave rise to the action happened in August, 1842, on a piece of land in Catskill, of which the defendant had been in possession about three years before. He removed to Herkimer county, and the plaintiff succeeded to the occupancy of the land, and had burned a coal-pit upon it, and was engaged in taking the coal to market. While he was absent for that purpose, the defendant came to the pit and began to take out the coal with a rake he found there, having a wagon in readiness to take the coal away. While thus engaged the plaintiff came there and asked the defendant what he was doing. Defendant said if he came there he would show him. Upon this the plaintiff took hold of the rake with a view of taking it from the defendant, who, letting go with one hand, knocked the plaintiff down. As he arose he again took hold of the rake, but the defendant pulled it away, and aimed a blow with it at the plaintiff's head, which the latter sought to stop by putting up his hand. The rake struck his arm near the wrist and broke the bone.

The defendant offered to show that he had title to the land upon which the coal-pit was burned, which was uncultivated and unimproved; and that the coal was made from his wood cut upon the land. The plaintiff's counsel objected to this evidence, and the objection was sustained. Verdict for the plaintiff for \$150. The defendant moves for a new trial.

JEWETT, J. Self-defence is a primary law of nature, and it is held an excuse for breaches of the peace and even for homicide itself. But care must be taken that the resistance does not exceed the bounds of mere defence, prevention, or recovery, so as to become vindictive; for then the defender would himself become the aggressor. The force used must not exceed the necessity of the case. *Elliott v. Brown*, 2 Wend. 497; *Gates v. Lounsbury*, 20 Johns. 427; *Gregory v. Hill*, 8 T. R. 299; *Baldwin v. Hayden*, 6 Conn. 453; 3 Black. Com. 3-5; 1 Hawk. P. C. 130; *Cockcroft v. Smith*, 2 Salk. 642; *Curtis v. Carson*, 2 N. H. 539.

A man may justify an assault and battery in defence of his lands or goods, or of the goods of another delivered to him to be kept. Hawk. P. C. b. 1, c. 60, § 23; *Seaman v. Cuppledick*, Owen, 150. But in these cases, unless the trespass is accompanied with violence, the owner of the land or goods will not be justified in assaulting the trespasser in the first instance, but must request him to depart or desist, and if he refuses he should gently lay his hands on him for the purpose of removing him, and if he resist with force then force sufficient to expel him may be used in return by the owner. *Weaver v. Bush*, 8 T. R. 78; *Buller's N. P.* 19; 1 East, P. C. 406. It is otherwise if the trespasser enter the close with force; in that case the owner may without previous request to depart or desist use violence in return, in the first instance, proportioned to the force of the trespasser, for the purpose only of subduing his violence.

"A civil trespass," says Holroyd, J., "will not justify the firing a pistol at the trespasser, in sudden resentment or anger. If a person takes forcible possession of another's close, so as to be guilty of a breach of the peace, it is more than a trespass; so if a man with force invades and enters the dwelling-house of another. But a man is not authorized to fire a pistol on every invasion or intrusion into his house; he ought, if he has a reasonable opportunity, to endeavor to remove the trespasser without having recourse to the last extremity." *Mead's Case*, 1 Lewis, C. C. 185; *Roscoe's C. Ev.* 262. The rule is, that in all cases of resistance to trespassers, the party resisting will be guilty of an assault and battery if he resists with such violence that it would, if death had ensued, have been manslaughter. Where one manifestly intends and endeavors, by violence or surprise, to commit a known felony upon a man's person (as to rob or murder, or to commit a rape upon a woman) or upon

a man's habitation or property (as arson or burglary), the person assaulted may repel force by force; and even his servant, then attendant on him, or any other person present, may interpose for preventing mischief; and in the latter case the owner, or any part of his family, or even a lodger with him, may kill the assailant, for preventing the mischief. Foster's Crown Law, 273.

The resumption of the possession of land and houses by the mere act of the party is frequently allowed. Thus a person having a right to the possession of lands, may enter by force, and turn out a person who has a mere naked possession, and cannot be made answerable in damages to a party who has no right and is himself a tortfeasor. Although if the entry in such case be with a strong hand or a multitude of people, it is an offence for which the party entering must answer criminally. *Hyatt v. Wood*, 4 Johns. 150; *Sampson v. Henry*, 13 Pick. 36.

In respect to personal property the right of recaption exists, with the caution that it be not exercised violently or by breach of the peace; for should these accompany the act, the party would then be answerable criminally. But the riot, or force, would not confer a right on a person who had none; nor would they subject the owner of the chattel to a restoration of it to one who was not the owner. *Hyatt v. Wood*, supra. In the case of personal property improperly detained or taken away it may be taken from the house and custody of the wrongdoer even without a previous request, but unless it was seized or attempted to be seized forcibly, the owner cannot justify doing anything more than gently laying his hands on the wrongdoer to recover it. *Weaver v. Bush*, supra; Com. Dig. Pleader, 3 M. 17; *Spencer v. McGowen*, 13 Wend. 256.

In one branch of the defence the defendant set up "son assault demesne." That was overthrown by evidence showing a manifest disproportion between the battery given and the first assault. Even a wounding was proved. The defendant also relied upon a defence of his possession of certain personal property, which he insisted was invaded by the plaintiff, and in the defence of which he committed the assault. To sustain this defence he proposed to prove that the coal-pit was on new and unimproved land to which he had title, and that the wood from which the coal was made was cut from this land without any authority from him; but this evidence was rejected. The object of strife between the parties was the possession of the rake, not the coal. The plaintiff is not shown to have committed a single act tending to disturb the defendant in his possession of the latter. The ownership of the coal therefore was not a material fact. But admitting that the defendant had a legal title to the coal, and that the plaintiff's object in regaining possession of the rake was to use it as a means of retaking the possession of the coal, still the defendant could not justify the *wounding* merely

in defence of his possession. *Gregory v. Hill*, supra. Unless the plaintiff first attempted forcibly to take the coal, of which there was no proof, I think the evidence was immaterial, and was properly overruled.

New trial denied.

3. PRIVILEGE.

SPALDING *v.* VILAS.

Supreme Court of the United States, October, 1895. 161 U. S. 483.

THE plaintiff alleged, in his declaration, that he was an attorney-at-law, and had been employed by a considerable number of persons who were postmasters of the United States, to obtain a readjustment and payment of their salaries, in accordance with the provisions of an act of Congress, relating thereto; that Congress had made appropriations for the payment of such claims; that he had made application to the defendant, who was Postmaster General of the United States, to adjust and pay the claims of said persons; and that the defendant refused so to do, and, intending to injure the plaintiff, had caused a circular to be sent to the said persons, under contract with the plaintiff, in which circular, the defendant had represented that the services of an attorney were unnecessary to collect the claims, and that contracts or powers of attorney to collect the claims were null and void, by act of Congress; and that these representations were false, and were intended by the defendant to injure the plaintiff. The defendant demurred to the declaration; the demurrer was sustained, and the plaintiff obtained a writ of error.

Mr. Justice Harlan . . . [After stating the facts, the court proceeded:]

The thought which underlies the entire argument for the plaintiff is that the circular issued from the Post Office Department, by direction of the Postmaster General, was beyond the scope of any authority possessed by that officer; and, therefore, the sending of the circular to the persons who had presented claims against the government was not justified by law, and would not protect the Postmaster General from responsibility for the injury done to the plaintiff from that act.

The statute of March 3, 1883, c. 119, 22 Stat. 487, relating to the readjustment of the salaries of postmasters of certain classes, provided that every readjustment of salary, under that act, should be upon a written application, signed by the postmaster, or late postmaster, or legal representative entitled to such readjustment, and that "each

payment made shall be by warrant or cheques on the treasurer or some assistant treasurer of the United States, made payable to the order of said applicant, and forwarded by mail to him at the post office within whose delivery he resides, and which address shall be set forth in the application above provided for." And, by the act of August 4, 1886, c. 903, § 8, 24 Stat. 256, 307, 308, it was declared that the payment of all sums thereby appropriated "shall be made by warrants or cheques, as provided by the said act of March 3, 1883, payable to the order of and transmitted to the persons entitled respectively thereto."

Whatever may have been the value of any services rendered by the plaintiff for his clients; even if the readjustment of their salaries was wholly due to his efforts "to procure mandatory legislation by Congress, pressing such legislation by all lawful means in his power," through many years, it was competent for the legislative branch of the government to provide that any sums ascertained to be due to claimants should be paid directly to them. Such a requirement could have had no other object than to make it certain that the full amount due to those whose salaries were readjusted was received by them personally, and should not pass through the hands of agents or attorneys. No one will question the power of Congress to enact legislation that would effect such an object. *Ball v. Halsell*, 161 U. S. 72. If such legislation worked injury to the plaintiff in that it gave his clients an opportunity to evade, for a time, the payment of what they may have agreed to allow him, it was an injury from which no cause of action could arise. This view is so clear that no argument in its support is necessary.

It results that the Postmaster General not only had the right, but it was his duty, to cause all cheques or warrants, issued under the authority of the above acts of Congress, to be sent directly to the claimants. If not strictly his duty, it was his right to call the attention of claimants to the provisions of the act of 1883. Of the legislation of Congress every one is presumed to have knowledge; but all know, as matter of fact, that the larger part of the people are not informed as to the provisions of many acts of Congress. No one could rightfully complain that the Postmaster General called the attention of those having business with his Department to an act of Congress that related to that business, and which would explain why cheques or warrants, in their favor, were sent directly to them, and were not delivered to agents or attorneys.

Nor did the Postmaster General exceed his authority when he informed claimants that Congress required cheques or warrants to be sent to them "because no attorney's services are necessary to the presentation of the claim before the Department, and Congress desired all the proceeds to reach the person really entitled thereto;" nor when he stated in his circular that "after a claim of this char-

acter is filed in the Department, its examination and the readjustment of salary, if found proper, are made directly from the books and papers in the Department by its officers, and without further evidence." Was it not true that any claim, under these acts of Congress must be, or could properly be, sustained or rejected according to the evidence furnished by the records of the Department? Besides, the statement that "no attorney's services were necessary to the presentation of the claim," if not strictly accurate, was, at most, only an expression of the opinion of the Postmaster General in the course of his official duties. As he was charged with the execution of the will of Congress in relation to the readjustment of those salaries, he was entitled to express his opinion as to the object for which the act of 1883 was passed, and to indicate what, in his judgment, was necessary to be done in order to bring claims under that act properly before the Department. Indeed, the clear indication in the act of 1883 of the desire of Congress that the full amount awarded to claimants should be paid directly to them, rendered it entirely appropriate that he should advise them of the fact that the records of the Department furnished all the evidence necessary for the readjustment directed by Congress. He did not by his circular advise claimants that they could disregard any valid contract made by them with attorneys. Claimants could not have understood him as recommending a violation of the legal rights of others. He said, in substance, nothing more than that they, the claimants, were mistaken if they supposed that the services of attorneys were required for the presentation and prosecution of their claims before the Department.

Equally without foundation is the suggestion that the Postmaster General exceeded his authority and duty when he called the attention of claimants to section 3477 of the Revised Statutes. That officer might well have apprehended that the salutary provisions of that section had been overlooked or disregarded by those interested or connected with the prosecution of these claims. If any claimant had transferred or assigned his claim, or any part of it, or any interest therein, or had executed any power of attorney, order or other instrument for receiving payment of such claim, or any part of it, before the claim was allowed, and before its amount was ascertained and a warrant for its payment issued, such transfer, assignment and power of attorney were null and void. The Postmaster General was directly in the line of duty when, in order that the will of Congress as expressed in the act of 1883 might be carried out, he informed claimants that they were under no legal obligation to respect any transfer, assignment, or power of attorney, which section 3477 of the Revised Statutes declared to be null and void. If the plaintiff had not taken any such transfers, assignments, or powers of attorney from his clients, he could not have been injured by the reference

made by the Postmaster General to that section. If he had taken such instruments, he cannot complain that the Postmaster General called the attention of claimants to the statute on the subject, and correctly interpreted it.

The act of the head of one of the departments of the government in calling the attention of any person having business with such department to a statute relating in any way to such business, cannot be made the foundation of a cause of action against such officers.

If, as we hold to be the case, the circular issued by the Postmaster General to claimants under the acts of Congress in question was not unauthorized by law, nor beyond the scope of his official duties, can this action be maintained because of the allegation that what the officer did was done maliciously?

This precise question has not, so far as we are aware, been the subject of judicial determination. But there are adjudged cases, in which principles have been announced that have some bearing upon the present inquiry.

In *Randall v. Brigham*, 7 Wall. 523, 535 — which was an action against one of the Justices of the Superior Court of Massachusetts for an alleged wrongful removal of the plaintiff from his office of an attorney and counsellor at law — it was said that whatever might be the rule in respect of judges of limited and inferior authority, judges of superior or general authority were not liable to civil actions for their judicial acts, even when such acts were in excess of their jurisdiction, “unless, perhaps, where the acts, in excess of jurisdiction, are done maliciously or corruptly.”

But in *Bradley v. Fisher*, 13 Wall. 335, 350, 351 — which was an action against a Justice of the Supreme Court of the District of Columbia to recover damages alleged to have been sustained by the plaintiff “by reason of the wilful, malicious, oppressive and tyrannical acts and conduct” of the defendant, whereby the plaintiff was deprived of his right to practise as an attorney in that court — it was said that the qualifying words, above quoted, were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction were not liable to civil suits for their judicial acts, even when such acts were in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction was made between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter, the court observing that “where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. In this country,” the court said, “the judges of the superior courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they dis-

charge the great trusts of their office. If in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment and suspended or removed from office." Again: "The exemption of judges of the superior courts of record from liability to civil suit for the judicial acts existing when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of the jurisdiction, cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence."

In *Yates v. Lansing*, 5 Johns. 282, 291, Kent, C. J., said: "The doctrine which holds a judge exempt from a civil suit or indictment for any act done or omitted to be done by him, sitting as a judge, has a deep root in the common law. It is to be found in the earliest judicial records, and it has been steadily maintained by an undisputed current of decisions in the English courts, amidst every change of policy, and through every revolution of their government."

The same principle was announced in England in the case of *Fray v. Blackburn*, 3 B. & S. 576, in which Mr. Justice Crompton said: "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore, the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges and prevent them from being harassed by vexatious actions." The principle was applied in one case for the protection of a county court judge, who was sued for slander, the words complained of having been spoken by him in his capacity as judge, while sitting in court, engaged in the trial of a cause in which the plaintiff was defendant. Chief Baron Kelly observed that a series of decisions, uniformly to the same effect, extending from the time of Lord Coke to the present time, established the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice, and that the doctrine had been applied to the court of a coroner, and to a court-martial, as well as to the superior courts. He said: "It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with inde-

pendence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him?" *Scott v. Stansfield*, L. R. 3 Ex. 220, 223.

In *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94, 114, which was an action for libel brought by an officer of the army against his superior officer to recover damages on account of a report made by the latter in relation to certain letters of the former, the defendant claimed that what he did was done in the course of and as an act of military duty. The replication stated that the libel was written by the defendant of actual malice, without any reasonable, probable or justifiable cause, and not bona fide or in the bona fide discharge of the defendant's duty as such superior officer. The case was heard on demurrer to the replication, and it was held by all the justices (Cockburn, C. J., only dissenting) that the action would not lie. The case was first considered in the light of the pleadings and the admissions of the demurrer. Mellor J., said: "I apprehend that the motives under which a man acts in doing a duty which it is incumbent upon him to do, cannot make the doing of that duty actionable, however malicious they may be. I think that the law regards the doing of the duty and not the motives from or under which it is done. In short, it appears to me, that the proposition resulting from the admitted statements in this record amounts to this: Does an action lie against a man for maliciously doing his duty? I am of opinion that it does not; and, therefore, upon the pleadings as they stand we might give judgment for the defendant." But, according to the report of that case, the Attorney General did not rest the defence on the effect of the admissions in the pleadings, but contended broadly that no action would lie against an officer of the army charged with duties such as those stated on the record, for the discharge of them. He likened the case to that of the judges of courts of law, to grand jurymen, petty jurymen, and to witnesses, against whom no action lies for what they do in the course of their duty, however maliciously they may do it, and claimed immunity for the defendant for the acts done in the course of his duty on the highest grounds of policy and convenience. No judge, no jury, nor witness, he said, "could discharge his duty freely if not protected by a positive rule of law from being harassed by actions in respect of the mode in which he did the duty imposed upon him, and he contended that the position of the defendant manifestly required the like protection to be extended to him and to all officers in the same position." "There is," Mellor, J., said, "little doubt that the reasons which justify the immunity in the one case do in great measure extend to the other."

An instructive case upon the general subject of the immunity of public officers from actions for damages on account of what they may have done in the course of their official duties is *Dawkins v. Lord Rokeby*, L. R. 8 Q. B. 255, 262, the judgment in which was affirmed by the House of Lords. L. R. 7 H. L. 744, 754. The defendant, a general in the English army, was called before a court of inquiry, legally assembled to inquire into the conduct of the plaintiff, also an officer in the army. He made statements in evidence, and after the close of the evidence, handed in a written paper (not called for by the court, but having reference to the subject of the inquiry) as to the conduct of that officer. An action was brought in respect of those statements, which were alleged to be both untrue and malicious. That case came before the Queen's Bench, in the Exchequer Chamber, upon a bill of exceptions allowed by Mr. Justice Blackburn, who had instructed the jury as matter of law that the action would not lie, if the verbal and written statements complained of were made by the defendant, being a military officer, in the course of a military inquiry, in relation to the conduct of the plaintiff, he being also a military officer, and with reference to the subject of that inquiry; and this even though the plaintiff should prove that the defendant had acted *mala fide*, and with actual malice, and without any reasonable or probable cause, and with the knowledge that the statements made and handed in by him were false. The court, all the judges concurring, sustained the correctness of this ruling, and held that the statements were privileged. "The authorities," it was said, "are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law." Lord Chancellor Cairns, in the House of Lords, said: "Adopting the expressions of the learned judges with regard to what I take to be the settled law as to the protection of witnesses in judicial proceedings, I certainly am of opinion that upon all principles, and certainly upon all considerations of convenience and public policy, the same protection which is extended to a witness in a judicial proceeding who has been examined on oath ought to be extended, and must be extended, to a military man who is called before a court of inquiry of this kind for the purpose of testifying there upon a matter of military discipline connected with the army. It is not denied that the statements which he made, both those which were made *viva voce* and those which were made in writing, were relative to the inquiry."

We are of opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by

heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts. As in the case of a judicial officer, we recognize a distinction between action taken by the head of a Department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision. Whatever difficulty may arise in applying these principles to particular cases, in which the rights of the citizen may have been materially impaired by the inconsiderate or wrongful action of the head of a Department, it is clear — and the present case requires nothing more to be determined — that he cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority, by reason of any personal motive that might be alleged to have prompted his action; for, personal motives cannot be imputed to duly authorized official conduct. In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subject to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty, as Postmaster General. The motive that impelled him to do that of which the plaintiff complains is, therefore, wholly immaterial. If we were to hold that the demurrer admitted, for the purposes of the trial, that the defendant acted maliciously, that could not change the law.

The judgment of the Supreme Court of the District of Columbia is

*Affirmed.*¹

¹ See *Chatterton v. Secretary of State*. [1895], 2 Q. B. 189.

4. CAPACITY.

A. Infants.

SLAYTON v. BARRY.

Supreme Court of Massachusetts, March, 1900. 175 Mass. 513.

TORT, for deceit and for conversion. Trial in the Superior Court, before Blodgett, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The material facts appear in the opinion, and in a note by the reporter.

MORTON, J. The declaration in this case is in two counts. The first count alleges in substance that the defendant intending to defraud the plaintiff, deceitfully and fraudulently represented to him that he was of full age and thereby induced the plaintiff to sell and deliver to him the goods described, and though often requested had refused to pay for or return the goods but had delivered them to persons unknown to the plaintiff. The second count is in tort for the conversion of the goods described in the first count. The case is here on exceptions to the refusal of the presiding judge to give certain instructions requested by the plaintiff,¹ and to his ruling ordering a verdict for the defendant. The question is whether the plaintiff can maintain his action. He could not bring an action of contract, and so has brought an action of tort. The precise question presented has never been passed upon by this court. *Merriam v. Cunningham*, 11 Cush. 40, 43. In other jurisdictions it has been decided differently by different courts. We think that the weight of authority is against the right to maintain the action. *Johnson v. Pie*, 1 Lev. 169; 1 Sid. 258; 1 Keb. 905. *Grove v. Nevill*, 1 Keb. 778. *Jennings v. Rundall*, 8 T. R. 335. *Green v. Greenback*, 2 Marsh. 485. *Price v. Hewett*, 8 Ex. 146. *Wright v. Leonard*, 11 C. B. (N. S.) 258. *De Roo v. Foster*, 12 C. B. (N. S.) 272. *Gilson v. Spear*, 38 Vt. 311. *Nash v. Jewett*, 61 Vt. 501. *Ferguson v. Bobo*, 54 Miss. 121. *Brown v. Dunham*, 1 Root, 272. *Geer v. Hovy*, 1 Root, 179. *Wilt v. Welsh*, 6 Watts, 9. *Burns v. Hill*, 19 Ga. 22. *Kilgore v. Jordan*, 17 Tex. 341. *Benjamin*, Sales (6th ed.) s. 23. *Cooley*, Torts,

¹The plaintiff requested the judge to instruct the jury: 1. That if the defendant, a minor, for the purpose of defrauding the plaintiff and inducing him to sell and deliver goods to the defendant falsely represented that he was of full age, and the plaintiff, relying on such representation, was thereby induced to sell and deliver goods to the defendant, who subsequently repudiated his purchase and refused to pay for the goods for the reason that he was a minor, he is liable in damages. 2. That if the defendant, a minor, purchased goods of the plaintiff, obtained possession of them, converted them to his own use, and subsequently repudiated the purchase and refused to pay for the goods for the reason that he was a minor, the plaintiff at the time of the purchase having no knowledge of the defendant's minority, the effect of the avoidance by the defendant of his contract was to make it void from the beginning, and to render him liable in damages for the conversion of the goods.

(2d ed.) 126. Add. Torts, (Wood's ed.) s. 1314. See contra, *Fitts v. Hall*, 9 N. H. 441; *Eaton v. Hill*, 50 N. H. 235; *Hall v. Butterfield*, 59 N. H. 354; *Rice v. Boyer*, 108 Ind. 472; *Wallace v. Morss*, 5 Hill, (N. Y.) 391.

The general rule is, of course, that infants are liable for their torts. *Sikes v. Johnson*, 16 Mass. 389. *Homer v. Thwing*, 3 Pick. 492. *Shaw v. Coffin*, 58 Maine, 254. *Vasse v. Smith*, 6 Cranch, 226. But the rule is not an unlimited one, but is to be applied with due regard to the other equally well settled rule that, with certain exceptions, they are not liable on their contracts; and the dominant consideration is not that of liability for their torts but of protection from their contracts. The true rule seems to us to be as stated in *Liverpool Adelphi Loan Association v. Fairhurst*, 9 Exch. 422, 429, where it was sought to hold a married woman for a fraudulent misrepresentation, namely, if the fraud "is directly connected with the contract . . . and is the means of effecting it, and parcel of the same transaction," then the infant will not be liable in tort. The rule is stated in 2 Kent Com. 241, as follows: "The fraudulent act, to charge him (the infant) must be wholly tortious; and a matter arising ex contractu, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover, or case, by a change in the form of the action." In the present case it seems to us that the fraud on which the plaintiff relies was part and parcel of the contract and directly connected with it. The plaintiff cannot maintain his action without showing that there was a contract, which he was induced to enter into by the defendant's fraudulent representations in regard to his capacity to contract, and that pursuant to that contract there was a sale and delivery of the goods in question. Whether as an original proposition it would be better if the rule were as laid down in *Fitts v. Hall* and *Hall v. Butterfield*, in New Hampshire, and *Rice v. Boyer*, ubi supra, in Indiana, we need not consider. The plaintiff relies on *Homer v. Thwing*, 3 Pick. 492, *Badger v. Phinney*, 15 Mass. 359, and *Walker v. Davis*, 1 Gray 506. In *Walker v. Davis* there was no completed contract and the title did not pass. The sale of the cow by the defendant operated therefore clearly as a conversion. *Badger v. Phinney* was an action of replevin, and it was held that the property had not passed, or if it had that it had reverted in the plaintiff in consequence of the defendant's fraud. The plaintiff maintained his action independently of the contract. In *Homer v. Thwing* the tort was only incidentally connected with the contract of hiring.

We think that the exceptions should be overruled.

So ordered.

B. Insane Persons.

WILLIAMS v. HAYS.

Court of Appeals of New York, November, 1894. 143 N. Y. 442.

PLAINTIFF sued as assignee of the Phoenix Insurance Co. to recover \$893.89 paid to the firm of Parsons & Loud, as owners of one-sixteenth of a vessel, upon a policy of insurance issued by said company to the said firm. There was a verdict for the defendant and the plaintiff's motion for a new trial, and motion for a re-argument were denied. The orders denying these motions were affirmed in the general term of the Supreme Court and the plaintiff appealed.

The facts are stated in the opinion.

EARLE, J. The defendant and others, among whom were Parsons and Loud, were joint owners of the brig "Sheldon." By an arrangement between the defendant and the other owners he took the vessel to sail on shares. He was to man the vessel, to pay the crew and to furnish the supplies, and he was to have one-half of her earnings, after certain deductions, for his share, and the other owners were to have from him the other half, after certain deductions, for their share. He was to have the absolute control and management of the vessel, and became her owner *pro hac vice*. *Webb v. Pierce*, 1 Curt. 113; *Thorp v. Hammond*, 12 Wall. 416; *Somes v. White*, 65 Me. 542. The defendant, under the arrangement between him and the other owners, in no sense became their agent or servant. In *Webb v. Pierce* it was held that where a master hires a vessel on shares under an agreement to victual and man her, and employ her on such voyages as he thinks best, having thereby the entire possession, command and navigation of her, he thereby becomes her owner *pro hac vice*, and the relation of principal and agent does not exist between him and the owners. The other cases are to the same effect. The defendant thus became the charterer or lessee of the vessel and was responsible to the other owners for due care in her management, and so the trial judge held.

The Sheldon was loaded with ice and started from the coast of Maine for a southern port. She soon encountered storms, and the defendant for more than two days was constantly on duty, and then becoming exhausted, he went to his cabin, leaving the vessel in charge of the mate and crew. He took a large dose of quinine and laid down. The mate found that the rudder was broken and useless, and that the vessel could not be steered. He caused the captain to come on deck. He refused to believe that the vessel was in any trouble, and refused the help of two tugs, the masters of which saw the difficulty under which his vessel was laboring, and successively offered to take her in

tow. They cautioned him that his vessel was gradually and certainly drifting upon the shore; and in broad day-light she did drift upon the shore without any effort upon the part of the defendant or any of his crew to save her, and she became a total wreck. Parsons and Loud had insured their interest in the Phoenix Insurance Company, and it paid them the loss. It thus became subrogated to their claim, if any, against the defendant for his negligence or misconduct in the management of the vessel, and it assigned that claim to the plaintiff. He, standing in the shoes of Parsons and Loud, brought this action against the defendant to recover damages for the loss of the vessel, alleging that it was due to his carelessness and misconduct.

The defendant claims that from the time he went to his cabin, leaving the vessel in charge of his mate and crew, to the time the vessel was wrecked, and he found himself in the life-saving station, he was unconscious and knew nothing of what occurred — that in fact he was from some cause insane, and, therefore, not responsible for the loss of the vessel. The case was submitted to the jury on the theory that the defendant, if sane, was guilty of negligence causing the destruction of the vessel, but if insane was not responsible for her loss through any conduct on his part which in a sane person would have constituted such negligence as would have imposed responsibility.

The important question for us to determine then is whether the insanity of the defendant furnishes a defence to the plaintiff's claim, and I think it does not. The general rule is that an insane person is just as responsible for his torts as a sane person, and the rule applies to all torts, except perhaps those in which malice and, therefore, intention, actual or imputed, is a necessary ingredient, like libel, slander and malicious prosecution. In all other torts intention is not an ingredient, and the actor is responsible, although he acted with a good and even laudable purpose, without any malice. The law looks to the person damaged by another and seeks to make him whole, without reference to the purpose or the condition, mental or physical, of the person causing the damage. The liability of a lunatic, for his torts, in the opinions of judges, has been placed upon several grounds. The rule has been invoked that where one of two innocent persons must bear a loss, he must bear it whose act caused it. It is said that public policy requires the enforcement of the liability that the relatives of a lunatic may be under inducement to restrain him, and that tort feasers may not simulate or pretend insanity to defend their wrongful acts causing damage to others. The lunatic must bear the loss occasioned by his torts, as he bears his other misfortunes, and the burden of such loss may not be put upon others.

In Buswell on Insanity (sec. 355) it is said: "Since in a civil action for a tort it is not necessary to aver or prove any wrongful intent on the part of the defendant, it is a rule of the common law

that although a lunatic may not be punishable criminally, he is liable in a civil action for any tort he may commit."

In Cooley on Torts (98) the learned author says: "A wrong is an invasion of right to the damage of the party who suffers it. It consists in the injury done, and not commonly in the purpose or mental or physical capacity of the person or agent doing it. It may or may not have been done with bad motive; the question of motive is usually a question of aggravation only. Therefore, the law in giving redress has in view the case of the party injured, and the extent of his injury, and makes what he suffers the measure of compensation. . . . There is consequently no anomaly in compelling one who is not chargeable with wrong intent to make compensation for an injury committed by him; for, as is said in an early case, 'the reason is because he that is damaged ought to be recompensed.'" And at page 100 he says: "Undoubtedly there is some appearance of hardship—even of injustice—in compelling one to respond for that which, for want of the control of reason, he was unable to avoid; that it is imposing upon a person already visited with the inexpressible calamity of mental obscurity an obligation to observe the same care and precaution respecting the rights of others that the law demands of one in the full possession of his faculties. But the question of liability in these cases, as well as in others, is a question of policy, and it is to be disposed of as would be the question whether the incompetent person should be supported at the expense of the public, or of his neighbors, or at the expense of his own estate. If his mental disorder makes him dependent, and at the same time prompts him to commit injuries, there seems to be no greater reason for imposing upon the neighbors or the public one set of these consequences rather than the other; no more propriety or justice in making others bear the losses resulting from his unreasoning fury when it is spent upon them or their property, than there would be in calling upon them to pay the expense of his confinement in an asylum when his own estate is ample for the purpose."

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The doctrine of these authorities is illustrated in many interesting cases. *Bullock v. Babcock*, 3 Wend. 391; *Hartfield v. Roper*, 21 Id. 615; *Krom v. Schoonmaker*, 3 Barb. 647; *Conklin v. Thompson*, 29 Id. 218; *Cross v. Kent*, 32 Md. 581; *Neal v. Gillett*, 23 Conn. 437; *Huchting v. Engel*, 17 Wis. 230; *Brown v. Howe*, 9 Gray, 84; *Morain v. Devlin*, 132 Mass. 87; *Beales v. See*, 10 Penn. St. 56; *Humphrey v. Douglass*, 10 Vt. 71; *Morse v. Crawford*, 17 Id. 499; *Cross v. Andrews*, *Croke*, *Elizabeth*, 622; *Jennings v. Rundall*, 8 T. R. 336.

In *Bullock v. Babcock*, Judge Marey, writing in a case where an infant twelve years old was held liable for putting out one of the eyes of another infant, said: "The liability to answer in damages

for trespass does not depend upon the mind or capacity of the actor; for idiots and lunatics are responsible in the action of trespass for injuries inflicted by them."

In *Krum v. Schoonmaker* it was held that a lunatic may be sued for an injury done to another, because the intent with which the act was done is not material. There the action was against a justice of the peace for false imprisonment for issuing a warrant without any complaint, by virtue of which the plaintiff was arrested.

In *Cross v. Kent*, it was held that a lunatic or insane person, though not punishable criminally, is liable to a civil action for any tort he may commit; that in an action against a party for setting fire to and burning a barn, neither evidence of his lunacy, nor that the burning was the result of accident, is admissible in mitigation of compensatory damages.

In *Neal v. Gillett*, in an action on the case for damages caused by the negligence of the defendants, who were severally of the ages of thirteen and sixteen at the time of the injury, it was held that where the plaintiff claims only actual damages, the youth of the defendants is not to be taken into consideration in determining the question of their negligence.

In *Huchting v. Engel*, it was held that an infant, though under seven years of age, was liable in an action of trespass for breaking and entering the plaintiff's premises and breaking down and destroying his shrubbery and flowers.

In *Karow v. The Continental Insurance Company* it is said in the opinion: "While the burning of his own property by an assured under no restraint of duty and incapable of care, and without any intent or design, does not relieve the company from liability, yet the same act of burning another's property might subject such person to damages therefor, not on the ground of negligence, as that word is usually understood, but, in the language of Chief Justice Gibson, 'on the principle that where a loss must be borne by one of two innocent persons, it should be borne by him who occasioned it.'"

In *Brown v. Howe* an insane person carelessly set fire to the dwelling house of his guardian, and while it was held that the guardian could not be allowed the amount of his damages in his probate account, it was held that his only course was to sue the administrator of the lunatic who had died, in a court of law, and have a judgment fixing his damages, and collect it from the assets, if the estate was solvent; if not, to share with the other creditors.

In *Morain v. Devlin*, it was held that a lunatic was civilly liable for an injury caused by the defective condition of a place, not in the exclusive occupancy and control of a tenant, upon real estate of which he is the owner, and of which his guardian has the care and management.

In *Beales v.* See it was said by Gibson, C. J.: "As an insane man

is civilly liable for his torts, he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes, on the principle that where a loss must be borne by one of two innocent persons it shall be borne by him who occasioned it."

In *Morse v. Crawford*, in an action for tort, it was held that the fact that the defendant was insane at the time of committing the injury was no defence to the action, and that if the action be for destroying property intrusted to the defendant, it is no defence that the plaintiff, at the time of delivering the property to the defendant, knew that he was insane. In the opinion of the court it is said: "It is a common principle that a lunatic is liable for any tort which he may commit, though he is not punishable criminally. When one receives an injury from the act of another, this is a trespass, though done by mistake or without design. Consequently no reason can be assigned why a lunatic should not be held liable."

In *Jennings v. Rundall*, Lord Chief Justice Kenyon said: "If an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice." Lawrence, J., also writing in that case, mentioned the distinction between negligence and an act done by an infant; and he held that the same rule would have to be applied if an action were brought against an infant for negligently keeping the plaintiff's cattle, by which they died, as would be applied if the declaration charged the infant with having given the cattle bad food by which they died.

There can be no distinction as to the liability of infants and lunatics, between torts of non-feasance and of misfeasance — between acts of pure negligence and acts of trespass. The ground of the liability is the damage caused by the tort. That is just as great whether caused by negligence or trespass; the injured party is just as much entitled to compensation in the one case as in the other, and the incompetent person must, upon principles of right and justice and of public policy, be just as much bound to make good the loss in the one case as the other; and I have found no case which makes the distinction. That infants and lunatics are liable for damage to property caused by their negligent acts, was asserted in several of the authorities above cited; and it has never been doubted that at common law an action of trover would lie against one intrusted with the personal property of another who destroys it, whether the destruction be by a negligent act or a wilful tort.

I sum up the result of my examination of the authorities as follows: This vessel was intrusted to the defendant — not as agent — but as to the other owners as charterer, lessee or bailee, and if he caused her destruction by what in sane persons would be called wilful or negligent conduct, the law holds him responsible. The misfortune must fall upon him and not upon the other owners of the vessel.

If the defendant had become insane solely in consequence of his

efforts to save the vessel during the storm, we would have had a different case to deal with. He was not responsible for the storm, and while it was raging his efforts to save the vessel were tireless and unceasing, and if he thus became mentally and physically incompetent to give the vessel any further care, it might be claimed that his want of care ought not to be attributed to him as a fault. In reference to such a case we do not now express any opinion.

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If it should be found upon the new trial of this action that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should, therefore, be held that no fault could be attributed to him on account of what he personally did or omitted to do, then the question would still remain whether the carelessness of his mate and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their carelessness. They did nothing whatever to save the vessel. They did not even expostulate with him or tender him any advice or a word of caution, and yet the mate saw what the captains of the tugs saw at a distance, that something was the matter with him. It is difficult to perceive how they could have failed to see that he was either incompetent to manage the vessel, or that he was willfully wrecking her. We leave the effect of their conduct upon the defendant's liability to be determined, if it should become necessary, upon the new trial, simply saying that the question is worthy of careful consideration, whether the defendant can allege his own incompetency, and at the same time claim that for any reason the mate ought not to have taken control of the vessel.

The case of *Hays v. Phenix Insurance Co.*, 25 J. & S. 199; aff., 127 N. Y. 656, which seems to have controlled the decision below, is not an authority for the defendant. There he brought an action against the insurance company to recover the amount of his insurance upon his vessel, and his mere carelessness, whether sane or insane, was no defence to such an action. It is an unquestioned rule of law that an insurance company cannot successfully defend an action upon its policy to recover for a loss by showing that the insured destroyed the property while insane, or that its destruction was caused by the carelessness of his agents and servants. The liability of the insured to respond in damages for the loss or destruction of the property of another owner stands upon different principles. *Liverpool S. Co. v. Phoenix Insurance Co.*, 129 U. S. 438; *Karow v. Continental Insurance Co.* 57 Wis. 56.

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I quite agree, and no one in this case has contended for more, that the defendant was bound, in the navigation and use of the vessel, to bestow only ordinary care, to wit: Such care as a reasonably careful

and prudent owner would ordinarily give to his own vessel. Such is the standard of care set up for all bailees of personal property for hire. But what is that standard? It is not such care as a lunatic, a blind man, a sick man, or a man otherwise physically or mentally imperfect or impotent could give. Such a man is not the jural man of ordinary prudence, and he does not furnish the standard. The standard man is no individual man, but an abstract or ideal man of ordinary mental and physical capacity and ordinary prudence. The particular man whose duty of care is to be measured does not furnish the standard. He may fall below it in capacity and prudence, yet the law takes not account of that, but requires that he should come up to the standard and his duty be measured thereby.

So when we have defined, as above, the duty of care resting upon the defendant, we have made no progress in the solution of the question here involved, for it is conceded that he took no care whatever. It is sought, however, to excuse him because he was insane and incapable of care; and the question, and, in the end, the sole question for us to determine, is whether that excuse is a good one; and I have heard no argument to sustain it. It is unquestioned that an insane person is civilly liable for his active torts; and is there then any reason for saying that he is not liable for his negligent torts? To uphold this judgment, we must engraft upon the general rule the exception or qualification that he is not liable for his negligent torts. If the defendant had taken a torch and fired the vessel, he would have been liable for her destruction, although his act was unconscious and accompanied by no free will. But if he had negligently fired the vessel and thus destroyed her, being incapable from his mental infirmity from exercising any care, the claim must be that he would not be liable. Such a distinction is not hinted at in any authority, has no foundation whatever in principle or reason, and cannot stand with authorities I have before cited.

My conclusion, therefore, is that the judgment should be reversed and a new trial granted, costs to abide event.

All concur, except Peckham, Gray and O'Brien, JJ., dissenting.

*Judgment reversed.*¹

C. Corporations.

HILL v. CITY OF BOSTON.

Supreme Court of Massachusetts, March, 1877. 122 Mass. 344.

THE case is stated in the opinion.

GRAY, C. J. This is an action of tort against the city of Boston. The plaintiff, who sues by his next friend, offered to prove at the

¹ This case, after a retrial, was again taken to the Court of Appeals, reported 157 N. Y. 541.

trial that in May, 1874, he was of the age of eight years, and was a pupil attending a school in Boston, which was one of the public schools which the city was bound by law to keep and maintain; that this school was on the third floor of the building in which it was kept; that the staircase was winding, and the railing thereof so low as to be dangerous; that the city negligently constructed and maintained the building, and authorized the public schools to be kept therein; and that the plaintiff, while going to school, and being in the exercise of due care, fell over the railing of the second flight of stairs, and was seriously injured.

The plaintiff also offered to prove that the school committee of the city, for a long time before the accident, knew the building to be dangerous and unfit for the purposes of a public school, and had been notified by the teachers of the school of the dangerous condition, and had promised to repair the same, and had neglected to do so. But the school committee is not charged by law with any duty of erecting or constructing school-houses, but only with that of keeping them in good order when built, and with the general charge and management of the schools, and of procuring a suitable place for the schools where there is no school-house. The duty to provide and maintain school-houses, properly furnished, is imposed by general law upon all towns and cities in the Commonwealth. Gen. Sts. c. 3, s. 7, cl. 17; c. 38, ss. 36, 40. Sts. 1821, c. 110, s. 19; 1854, c. 448, s. 56. The declaration does not proceed, and the learned counsel for the plaintiff does not rely, upon any negligence of the school committee, but upon the negligence of the city in improperly constructing the school-house; and the length of time that the condition of the staircase had existed; and been known to the school committee, is only material as bearing upon the question of negligence on the part of the city.

The question presented by the report is, whether, upon so much of the evidence offered as is competent, the plaintiff is entitled to recover; if he is, the case is to stand for trial; otherwise, judgment is to be entered for the defendant.

We had supposed it to be well settled in this Commonwealth that no private action, unless authorized by express statute, can be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage. But, it having been suggested at the argument that the recent opinions of the Supreme Court of the United States tended to a different result, the respect due to that high court, even in matters in which we are not bound by its decisions, has led us to reëxamine the foundations upon which our law rests, and, in stating our conclusion, to make fuller reference to the authorities than might under other circumstances have been thought expedient.

The question has most commonly arisen in actions for defects in highways and bridges, by reason of which persons passing over them have received injuries.

By the common law of England, the charge of repairing highways lay upon the inhabitants of the parish, of common right, and could rest upon other corporations or individuals only by tenure or prescription. Lord Hale, in *Austin's case*, 1 Vent. 183, 189. Com. Dig. Chimin, A. 4. Bac. Ab. Highways, E. 13 Rep. (ed. 1826) 33, note B. Bridges in highways, if "within any city or town corporate," were to be repaired by the inhabitants of such city or town; if "without the city or town corporate," by the county; and no other corporation or private person was bound to repair a bridge, unless by tenure or prescription. For want of repair in a private bridge, the person entitled to a passage over it might have a remedy by writ de ponte reparando; but for want of repair in a public bridge, the remedy was by presentment or information at the suit of the King. "Where it cannot be known and proved what persons, lands, tenements and bodies politic" were bound to make or repair a public bridge, the St. of 22 H. VIII. c. 5, provided a more speedy remedy to compel the inhabitants of the city, town or county to repair, by application to four justices of the peace. 3 Sts. of the Realm, 322. 2 Inst. 696-703. Repair of Bridges, 13 Rep. 33. *Regina v. Justices of St. Peter's* 2 Ld. Raym. 1249, 1251. Com. Dig. Chimin. B. 3. Bac. Ab. Bridges.

Although the English books contain numerous cases of indictments or informations for neglect to repair highways and bridges, no instance has been referred to, in the frequent discussions of the subject in England and in this country, in which an English court has sustained a private action against a public or municipal corporation or quasi corporation for such neglect, except under a statute expressly or by necessary implication giving such a remedy. . . .

[The court cites numerous English cases, and proceeds:]

The towns and cities of Massachusetts have been established by the Legislature for public purposes and the administration of local affairs, and embrace all persons residing within their respective limits.

At the first settlement of the Colony, towns consisted of clusters of inhabitants dwelling near each other, which, by the effect of legislative acts, designating them by name, and conferring upon them the powers of managing their own prudential affairs, electing representatives and town officers, making by-laws, and disposing, subject to the paramount control of the Legislature, of unoccupied lands within their territory, became in effect municipal or quasi corporations, without any formal act of incorporation. *Porter v. Sullivan*, 7 Gray, 441, 444. *Commonwealth v. Roxbury*, 9 Gray, 451, 485. *West Roxbury v. Stoddard*, 7 Allen, 158, 169. *Lynn v. Nahant*, 113 Mass. 433, 448. By some of the earliest acts passed under the Province Charter, the

boundaries of all existing towns were confirmed, and towns were empowered to assess and levy taxes for the maintenance and support of schools and of the poor, and the defraying of other necessary charges arising within the towns, and were declared to be capable of suing and being sued. Prov. Sts. 1692-93 (W. & M.) c. 28; 1694-95 (6 W. & M.) c. 13; 1 Prov. Laws (State ed.) 64, 66, 182; Anc. Chart. 247, 249, 279. Soon after the adoption of the Constitution of the Commonwealth, it was for the first time expressly enacted that "the inhabitants of every town within this government are hereby declared to be a body politic and corporate." St. 1785, c. 75, s. 8. Rev. Sts. c. 15, s. 8. Gen. Sts. c. 18, s. 1. And it has always been recognized by this court, even before it was declared by statute, that towns, as well as counties, territorial parishes and school districts, by virtue of their existence as quasi corporations, were capable of holding property and making contracts for the purposes for which they were established. *Windham v. Portland*, 4 Mass. 384, 389. *Rumford School District v. Wood*, 13 Mass. 193, 198. *First Parish in Sutton v. Cole*, 3 Pick. 232, 240. Rev. Sts. c. 15, s. 11, and Commissioners' note. Gen. Sts. c. 18, s. 9.

By the common law of Massachusetts and of other New England States, derived from immemorial usage, the estate of any inhabitant of a county, town, or territorial parish or school district, is liable to be taken on execution on a judgment against the corporation. 5 Dane Ab. 158. *Hawkes v. Kennebeck*, 7 Mass. 461, 463. *Chase v. Merrimack Bank*, 19 Pick. 564, 569. *Gaskill v. Dudley*, 6 Met. 546. *Beardsley v. Smith*, 16 Conn. 368. In this Commonwealth, payment of such a judgment has never been compelled by mandamus against the corporation, as in other parts of the United States. *Dillon on Mun. Corp.* (2d ed.) ss. 446, 686. *Supervisors v. United States*, 4 Wall. 435.

From a very early period, towns have been, by general laws, required to keep highways and bridges in repair, and made liable to actions for defects therein by persons sustaining special damage in their persons or property. Mass. Col. St. 1648, 2 Mass. Col. Rec. 229; Mass. Col. Sts. (ed. 1672) 12. Prov. St. 1693-94 (5 W. & M.) c. 6, ss 1, 6; 1 Prov. Laws (State ed.) 136, 137. Anc. Chart. 55, 56, 267, 269. St. 1786, c. 81, ss 1, 7. Rev. Sts. c. 25, ss 1, 22. St. 1850, c. 5. Gen. Sts. c. 44, ss. 1, 22. The case of *Horton v. Ipswich*, 12 Cush. 488, cited for the plaintiff, was an action upon such a statute.

In a case in this court in 1810, in which an action was maintained against a corporation chartered to maintain a canal and to take tolls thereon, for suffering its canal to be out of repair, whereby the plaintiff's raft stuck fast and was injured, *Parsons, C. J.*, said, that although quasi corporations, such as counties and hundreds in England, and counties and towns in this state, were liable to information or indictment for a neglect of a public duty imposed on them by

law, yet it was settled in the case of *Russell v. Men of Devon*, 2 T. R. 667, above cited, that no private action could be maintained against them for a breach of their corporate duty, unless such action was given by statute. *Riddle v. Proprietors of Locks & Canals*, 7 Mass. 169, 187.

Two years later, the question was directly presented for judgment, in an action at common law against a town for a personal injury caused by a defect in a highway, of which the town had not had the notice required to charge it under the statute. It was argued for the plaintiff, that none of the objections which prevailed in *Russell v. Men of Devon* applied, because here the town was a corporation created by statute, capable of suing and being sued, was bound by statute to keep the public highways in repair, was called upon to answer only for its own default, and had a treasury out of which judgments recovered against it might be satisfied; and that the objection that a multiplicity of actions would be the consequence of levying the execution on one or more inhabitants of the town could have no effect, because it would equally apply to every action against a town or parish, and yet such actions were every day brought and supported. But the court arrested judgment, saying: "It is well settled that the common law gives no such action. Corporations created for their own benefit stand on the same ground, in this respect, as individuals. But quasi corporations, created by the Legislature for purposes of public policy, are subject, by the common law, to an indictment for the neglect of duties enjoined on them; but are not liable to an action for such neglect, unless the action be given by some statute." *Mower v. Leicester*, 9 Mass. 247, 250.

Those cases have ever since been considered as having established in this Commonwealth the general doctrine that a private action cannot be maintained against a town or other quasi corporation, for a neglect of corporate duty, unless such action is given by statute. *White v. Phillipston*, 10 Met. 108, 110. *Sawyer v. Northfield*, 7 Cush. 490, 494. *Bigelow v. Randolph*, 14 Gray, 541, 543. And they have been approved and followed throughout New England. *Adams v. Wiscasset Bank*, 1 Greenl. 361, 364. *Reed v. Belfast*, 20 Maine, 246, 248. *Farnum v. Concord*, 2 N. H. 392. *Eastman v. Meredith*, 36 N. H. 284, 297-300. *Hyde v. Jamaica*, 27 Vt. 443, 457. *State v. Burlington*, 36 Vt. 521, 524. *Chidsey v. Canton*, 17 Conn. 475, 478. *Taylor v. Peckham*, 8 R. I. 349, 352. [The court here discusses *Bartlett v. Crozier*, 17 Johns. 439; *Freeholders of Sussex v. Strader*, 3 Harrison, 108; *Commissioners of Highways v. Martin*, 4 Mich. 557; *Hamilton Commissioners v. Mighels*, 7 Ohio St. 109; *Eastman v. Meredith*, 36 N. H. 284; *Bigelow v. Randolph*, 14 Gray, 541].

The fact that the present action is brought against the city of Boston, and not against a county or town, does not, under the Constitution and laws of this Commonwealth, constitute any substantial distinction.

In this Commonwealth, an act of the Legislature changing a town into a city has never been considered as enlarging civil remedies for neglect of corporate duty; and it has been constantly held that a city, like a town, is not liable to an action for a defect in a highway, except so far as the right to maintain such an action has been clearly given by statute. *Brady v. Lowell*, 3 Cush. 121. *Harwood v. Lowell*, 4 Cush. 310. *Hixon v. Lowell*, 13 Gray, 59, 64. *Oliver v. Worcester*, 102 Mass. 489. The same view has been taken in other New England States, and in New Jersey, Michigan and California. *Morgan v. Hallowell*, 57 Maine, 375, 378. *Jones v. New Haven*, 34 Conn. 1, 13. *Hewison v. New Haven*, 37 Conn. 475. *Pray v. Jersey City*, 3 Vroom, 394. *Detroit v. Blackeby*, 21 Mich. 84. *Winbigler v. Los Angeles*, 45 Cal. 36.

Neither the act which originally established the city of Boston, St. 1821, c. 110, nor the act to revise the city charter, St. 1854, c. 448, contains any provision as to the duty of the city to repair highways, or to provide school-houses. Each of these duties depends upon general laws, applicable to all cities and town alike.

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Assuming, therefore, that the form of the staircase of school-houses is not left exclusively to the discretion of the city, and that the negligence offered to be proved at the trial might be a cause of indictment, it is quite clear that, according to the statutes and decisions in this Commonwealth, it affords no ground of private action against the city. But it may be convenient, in this connection, to distinguish some of the principal cases in which this court has held cities liable to actions of tort by individuals.

If a city or town negligently constructs or maintains the bridges or culverts in a highway across a navigable river, or a natural water-course, so as to cause the water to flow back upon and injure the land of another, it is liable to an action of tort, to the same extent that any corporation or individual would be liable for doing similar acts. *Anthony v. Adams*, 1 Met. 284, 285. *Lawrence v. Fairhaven*, 5 Gray, 110. *Perry v. Worcester*, 6 Gray, 544. *Parker v. Lowell*, 11 Gray, 353. *Wheeler v. Worcester*, 10 Allen, 591. So if a city, by its agents, without authority of law, makes or empties a common sewer upon the property of another to his injury, it is liable to him in an action of tort. *Proprietors of Locks & Canals v. Lowell*, 7 Gray, 223. *Hildreth v. Lowell*, 11 Gray, 345. *Haskell v. New Bedford*, 108 Mass. 208. But in such cases, the cause of action is not neglect in the performance of a corporate duty, rendering a public work unfit for the purposes for which it is intended, but it is the doing of a wrongful act, causing a direct injury to the property of another, outside of the limits of the public work.

As to common sewers, built by municipal authorities under a

power conferred by law, it has been held, upon great consideration, that, as the power of determining where the sewers shall be made involves the exercise of a large and quasi judicial discretion, depending upon considerations affecting the public health and general convenience, therefore no action lies for a defect or want of sufficiency in the plan or system of drainage adopted within the authority so conferred; but that, as the sewer acts were not made applicable to any city, unless accepted by it, and, when accepted, and the sewers built, vested in the city the property in the sewers, and authorized it to assess the expense of construction upon the lands immediately benefited, and as the duty of constructing the sewers and keeping them in repair was merely ministerial, therefore, for neglect in the construction or repair of any particular sewer, whereby private property was injured, an action might be maintained against the city. *Gen. Sts. c. 48. Sts. 1841, c. 115; 1857, c. 225; 1869, c. 111. Child v. Boston, 4 Allen, 41. Emery v. Lowell, 104 Mass. 13. Merrifield v. Worcester, 110 Mass. 216.*

The only other cases in Massachusetts, which need be mentioned, are those in which a city, holding and dealing with property as its own, not in the discharge of a public duty, nor for the direct and immediate use of the public, but for its own benefit, by receiving rents or otherwise, in the same way as a private owner might, has been held liable, to the same extent as he would be, for negligence in the management or use of such property to the injury of others. *Thayer v. Boston, 19 Pick, 511. Oliver v. Worcester, 102 Mass. 489.* The distinction between acts done by a city in discharge of a public duty, and acts done for what has been called, by way of distinction, its private advantage or emolument, has been clearly pointed out by two eminent judges, while sitting in the supreme courts of their respective states, who have since acquired a wider reputation in the Supreme Court of the Union, and by the present Chief Justice of England. *Nelson, C. J., in Bailey v. Mayor &c. of New York, 3 Hill, 531, 539. Strong, J., in Western Saving Fund Society v. Philadelphia, 31 Penn. St. 185, 189. Cockburn, C. J., in Scott v. Mayor &c. of Manchester, 2 H. & N. 204, 210.*

[The court discusses numerous English cases and statutes, and proceeds:]

The result of the English authorities is, that when a duty is imposed upon a municipal corporation for the benefit of the public, without any consideration or emolument received by the corporation, it is only where the duty is a new one, and is such as is ordinarily performed by trading corporations, that an intention to give a private action for a neglect in its performance is to be presumed.

[After discussing decisions of the United States Supreme Court and the decisions of several states, the court proceeds:]

The result of this review of the American cases may be summed up as follows: There is no case, in which the neglect of a duty, imposed by general law upon all cities and towns alike, has been held to sustain an action by a person injured thereby against a city, when it would not against a town. The only decisions of the state courts, in which the mere grant by the Legislature of a city charter, authorizing and requiring the city to perform certain duties, has been held sufficient to render the city liable to a private action for neglect in their performance, when a town would not be so liable, are in New York since 1850, and in Illinois. The cases in the Supreme Court of the United States, in which private actions have been sustained against a city for neglect of a duty imposed upon it by law, are of two classes: 1st. Those which arose under the peculiar terms of special charters, in the District of Columbia, as in *Weightman v. Washington*, 1 Black, 39, and *Barnes v. District of Columbia*, 91 U. S. 540, or in a territory of the United States, as in *Nebraska City v. Campbell*, 2 Black, 590. 2d. Those which, as in *Mayor &c. of New York v. Sheffield*, 4 Wall, 189, and *Chicago City v. Robbins*, 2 Black, 418, arose in New York or in Illinois, and in which the general liability of the city was not denied or even discussed, and apparently could not have been, consistently with the rule by which the Supreme Court of the United States, upon questions of the construction and effect of the Constitution and statutes of a state, follows the latest decisions of the highest court of that state, even if like words have been differently construed in other states. *Elmendorf v. Taylor*, 10 Wheat. 152, 159. *Christy v. Pridgeon*, 4 Wall. 196. *Richmond v. Smith*, 15 Wall. 429. *Tioga Railroad v. Blossburg & Corning Railroad*, 20 Wall. 137. *State Railroad Tax Cases*, 92 U. S. 575, 615. In the absence of such binding decisions, we find it difficult to reconcile the view, that the mere acceptance of a municipal charter is to be considered as conferring such a benefit upon the corporation as will render it liable to private action for neglect of the duties thereby imposed upon it, with the doctrine that the purpose of the creation of municipal corporations by the state is to exercise a part of its powers of government—a doctrine universally recognized, and which has nowhere been more strongly asserted than by the Supreme Court of the United States, in the opinions delivered by Mr. Justice Hunt, in *United States v. Railroad Co.* 17 Wall. 322, 329, and by Mr. Justice Clifford, in *Laramie v. Albany*, 92 U. S. 307, 308.

But, however it may be where the duty in question is imposed by the charter itself, the examination of the authorities confirms us in the conclusion that a duty, which is imposed upon an incorporated city, not by the terms of its charter, nor for the profit of the corporation, pecuniarily or otherwise, but upon the city as the representa-

tive and agent of the public, and for the public benefit, and by a general law applicable to all cities and towns in the Commonwealth, and a breach of which in the case of a town would give no right of private action, is a duty owing to the public alone, and a breach thereof by a city, as by a town, is to be redressed by prosecution in behalf of the public, and will not support an action by an individual, even if he sustains special damage thereby; and, according to the terms of the report, there must be

Judgment for the defendant.

BOYD v. FIRE INSURANCE PATROL.

Supreme Court of Pennsylvania, October, 1888. 120 Pa. St. 624.

THIS was an action brought by the widow and son of Charles S. Boyd, deceased, to recover damages for the death of the deceased caused, as alleged by the plaintiff, by the negligence of the defendant's servants.

At the trial, before a jury, it appeared that on April 25, 1887, there had been a fire on Front Street, in the City of Philadelphia. The Fire Insurance Patrol, a corporation created and sustained by the insurance companies of the city, had sent its patrolmen there, and they had used heavy tarpaulins in the fourth floor of this store. A few days after, on the afternoon of May 6, 1882, two of these patrolmen, Hutchinson and Koochogey, went with a one-horse wagon to bring the tarpaulins away. They folded them up into bundles in the fourth story. Instead of putting them on a hoist, which ran up and down a large hatchway immediately alongside, and which was worked easily by the ropes, they determined to pitch them out of the window upon the pavement. Koochogey was stationed on the pavement to give notice to passers-by, so that they might not be struck by the tarpaulins; Hutchinson remained in the fourth story to throw them out. The bundles were quite large and each weighed about fifty pounds.

A little before three o'clock in the afternoon, a Mr. Allen was passing along on the pavement, when one of the bundles was thrown out by Hutchinson, and the warning given by Koochogey so late, that the bundle came within a foot or two of Mr. Allen. A few minutes after, Charles S. Boyd came from his store, No. 19 South Front street, a few doors above Coon's store, going down Front street. He passed from the pavement to the middle of the street, as if intending to go to the west side, but when opposite the store of Young & Co., which was on the north side of an alley, six feet wide from curb to curb, Coon's store being on the south side of this alley, he veered to the east side to go on the pavement in front of Coon's store. He

was very near-sighted and wore spectacles; he was walking rapidly and as he stepped on the curb of Coon's pavement, he heard a cry, "Look out!" but it came too late; a bundle of tarpaulins, thrown or pushed out of the window by Hutchinson, struck him on the back and broke his spine, and he died on the following Friday.

The purposes and the nature of the corporation are sufficiently set forth in the opinion.

The lower court, after giving instructions as to the defendant's negligence, the doctrine of respondeat superior, and the contributory negligence of the plaintiff's intestate, charged the jury that the defendant corporation was not a charitable corporation, and that if the plaintiff's intestate was killed by the negligence of the defendant's servant, while in the service and employ of the defendant, and in the course of that employment, the defendant was liable.

The jury brought in a verdict for the plaintiff and the defendant brought this writ of error. The grounds of error are sufficiently stated in the opinion.

PAXSON, J. When this case was here upon a former writ of error (see 113 Pa. 269), we did not decide the question whether the Fire Insurance Patrol was such a corporation as to be exempt from the rule of respondeat superior, for the reason that we had little before us but the charter itself, and that was not regarded as sufficient to show satisfactorily the character of the corporation. The case now comes up to us with additional light, and we have no difficulty in arriving at a conclusion.

Of the forty-two assignments of error I shall discuss only six, viz: the 30th to the 35th inclusive. The first five of these assignments present, in various forms, the question whether the Insurance Patrol is a public charity, while the 35th alleges that the court below erred in not giving the jury a binding instruction that the defendant was not liable in this action.

As disclosed by the charter "The object of the corporation was to protect and save life and property in or contiguous to burning buildings, and to remove and take charge of such property or any part thereof, when necessary." As disclosed by the evidence, it appears to be a corporation without capital stock or moneyed capital; that it is supported by voluntary contributions, derived from different fire insurance companies; that its object and business is to save life and property in or contiguous to burning buildings; that in saving and protecting such property no difference is made between property insured and property which is not insured; that no profits or dividends are made and divided among the corporators.

Passing by for the present the question of a public charity, it seems plain that this corporation might well have been created by the state in aid of the municipal government of the city of Philadelphia. It is one of the recognized functions of municipal government, to sup-

press and extinguish fires. For this purpose the city has a paid fire department, which has taken the place of the volunteer fire department formerly in existence. It is as much the province or duty of the city to save life and property at fires as to extinguish such fires, and the Fire Insurance Patrol might well have been organized as an auxiliary to the city government and placed under its direct control. That it aids the city as a volunteer does not alter the fact that it is still an auxiliary of the municipal government, performing functions which that government might properly perform, just as did the old volunteer fire department.

Is the Insurance Patrol a public charitable institution? The learned court below held that it was not, upon the ground that the main object of the institution was to benefit the insurance companies, who were the chief contributors to its funds. In other words, the learned judge tested the nature and character of the institution by the motives of its contributors.

Our conclusion is that the Fire Insurance Patrol of Philadelphia is a public charitable institution; that in the performance of its duties it is acting in aid and in ease of the municipal government in the preservation of life and property at fires. It remains to inquire whether the doctrine of respondeat superior applies to it. Upon this point we are free from doubt. It has been held in this state that the duty of extinguishing fires and saving property therefrom is a public duty, and the agent to whom such authority is delegated is a public agent and not liable for the negligence of its employees. This doctrine was affirmed by this court in *Knight v. City of Philadelphia*, 15 W. N. 307, where it was said: "We think the court did not commit any error in entering judgment for the defendant upon the demurrer. The members of the fire department are not such servants of the municipal corporation as to make it liable for their acts or negligence. Their duties are of a public character, and for a high order of public benefit. The fact that this act of assembly did not make it obligatory on the city to organize a fire department, does not change the legal liability of the municipality for the conduct of the members of the organization. The same reason which exempts the city from liability for the acts of its policemen, applies with equal force to the acts of the firemen." And it would seem from this and other cases to make no difference as respects the legal liability, whether the organization performing such public service is a volunteer or not: *Jewett v. New Haven*, 38 Conn. 379; *Russell v. Men of Devon*, 2 T. R. 672; *Fcoffees of Heriot's Hospital v. Ross*, 12 C. & F. 506; *Riddle v. Proprietors*, 7 Mass. 187; *McDonald v. Hospital*, 120 Mass. 432; *Boyd v. Insurance Patrol*, 113 Pa. 269. But I will not pursue this subject further, as there is another and higher ground upon which our decision may be placed.

The Insurance Patrol is a public charity; it has no property or funds which have not been contributed for the purposes of charity, and it would be against all law and all equity to take those trust funds, so contributed for a special, charitable purpose, to compensate injuries inflicted or occasioned by the negligence of the agents or servants of the patrol. It would be carrying the doctrine of respondeat superior to an unreasonable and dangerous length. That doctrine is at best—as I once before observed—a hard rule. I trust and believe it will never be extended to the sweeping away of public charities; to the misapplication of funds, specially contributed for a public charitable purpose, to objects not contemplated by the donors. I think it may be safely assumed that private trustees, having the control of money contributed for a specific charity, could not in case of a tort committed by one of their members, apply the funds in their hands to the payment of a judgment recovered therefor. A public charity, whether incorporated or not, is but a trustee, and is bound to apply its funds in furtherance of the charity and not otherwise. This doctrine is hoary with antiquity and prevails alike in this country and in England, where it originated as early as the reign of Edward V., and it was announced in the Year Book of that period. In the *Feoffees of Heriot's Hospital v. Ross*, 12 C. & F. 506, a person eligible for admission to the hospital brought an action for damages against the trustees for the wrongful refusal on their part to admit him. The case was appealed to the House of Lords when it was unanimously held that it could not be maintained. Lord Cottenham said: "It is obvious that it would be a direct violation, in all cases, of the purpose of a trust if this could be done; for there is not any person who ever created a trust that provided for payment out of it of damages to be recovered from those who had the management of the fund. No such provision has been made here. There is a trust, and there are persons intended to manage it for the benefit of those who are to be the objects of the charity. To give damages out of a trust fund would not be to apply it to those objects which the author of the fund had in view, but would be to divert it to a completely different purpose." Lord Brougham said: "The charge is that the governors of the hospital have illegally and improperly done the act in question, and therefore, because the trustees have violated the statute, therefore—what? Not that they shall themselves pay the damages, but that the trust fund which they administer shall be made answerable for their misconduct. The finding on this point is wrong, and the decree of the court below must be reversed." Lord Campbell: "It seems to have been thought that if charity trustees have been guilty of a breach of trust, the persons damnified thereby have a right to be indemnified out of the trust funds. That is contrary to all reason, justice and common sense. Such a perversion of the intention of the donor would lead to most inconvenient

consequences. The trustees would in that case be indemnified against the consequences of their own misconduct, and the real object of the charity would be defeated. Damages are to be paid from the pocket of the wrong doer, not from a trust fund. A doctrine so strange, as the court below has laid down in the present case, ought to have been supported by the highest authority. There is not any authority, not a single shred here to support it. No foreign or constitutional writer can be referred to for such a purpose." I have quoted at some length from the opinions of these great jurists because they express in vigorous and clear language the law upon this subject. I have not space to discuss the long line of cases in England and this country in which the above principle is sustained. It is sufficient to refer to a few of them by name: *Riddle v. Proprietors of the Locks*, 7 Mass. 187; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; *Sherbourne v. Yuba Co.*, 21 Cal. 113; *Brown v. Inhabitants of Vinalhaven*, 65 Me. 402; *Mitchell v. City of Rockland*, 52 Me. 118; *City of Richmond v. Long*, 17 Grattan 375; *Ogg v. City of Lansing*, 35 Ia. 495; *Murtaugh v. City of St. Louis*, 44 Mo. 479; *Patterson v. Penn. Reform School*, 92 Pa. 229; *Maximillian v. Mayor*, 62 N. Y. 160.

I am glad to be able to say that no state in this country, or in the world, has upheld the sacredness of trusts with a firmer hand than the state of Pennsylvania. Not only is a trustee for a public or private use not permitted to misapply the trust funds committed to his care, but if he convert them to his own use the law punishes him as a thief. How much better than a thief would be the law itself, were it to apply the trust's funds contributed for a charitable object, to pay for injuries resulting from the torts or negligence of the trustee? The latter is legally responsible for his own wrongful acts. I understand a judgment has been recovered against the individual whose negligence occasioned the injury in this case. If we apply the money of the Insurance Patrol to the payment of this judgment, or of the same cause of action, what is it but a misapplication of the trust fund; as much so as if the trustees had used it in payment of their personal liabilities? It would be an anomaly to send a trustee to the penitentiary for squandering trust funds in private speculations, and yet permit him to do practically the same thing by making it liable for his torts. If the principle contended for here were to receive any countenance at the hands of this court, it would be the most damaging blow at the integrity of trusts which has been delivered in Pennsylvania. We are not prepared to take this step.

We are not unmindful of the fact that it was contended for the defendants in error that the case of *Felloes of Heriot's Hospital v. Ross*, is in conflict with *Mersey Docks v. Gibbs*, L. R. 1 E. & I. App. Cas. 93, and *Parnaby v. Lancaster Canal Co.*, 11 Ad. & E. 223. I am unable to see any such conflict. The two corporations last named were evidently trading corporations and in no proper sense public

charities. In regard to the docks, it was said by Blackburn, J., at page 465: "There are several cases relating to charities which were mentioned at your Lordship's Bar, but were not much pressed, nor, as it seems to us, need they be considered now: for whatever may be the law as to the exemption of property occupied for charitable purposes, it is clear that the docks in question can come within no such exemption."

I will not consume time by discussing the case of *Glavin v. Rhode Island Hospital*, 12 R. I. 141, which, to some extent, sustains the opposite view of this question. There, a hospital patient paying eight dollars per week for his board and medical attendance, was allowed to recover a verdict against the hospital for unskilful treatment, and it was held that the general trust funds of a charitable corporation are liable to satisfy a judgment in tort recovered against it for the negligence of its officers or agents. It is at least doubtful, whether under its facts the case applies, and if it does, we would not be disposed to follow it in the face of the overwhelming weight of authority the other way, and of the sound reasoning by which it is supported.

The foregoing is little more than a re-assertion of the views of this court as heretofore expressed in this case by our brother Clark: See 113 Pa. 269. Many of the authorities I have referred to are there cited by him. We are now more fully informed as to the facts of the case, and can apply to them the law as indicated in the former opinion.

We are all of opinion that the Insurance Patrol is not liable in this action, and the judgment against it is therefore

Reversed.

5. PROXIMATE AND REMOTE CAUSE.

SCHEFFER *v.* RAILROAD COMPANY.

Supreme Court of the United States, October, 1881. 105 U. S. 249.

THE case is stated in the opinion.

MR. JUSTICE MILLER. . . .

The plaintiffs, executors of Charles Scheffer, deceased, brought this action to recover of the Washington City, Virginia Midland, and Great Southern Railroad Company, damages for his death, which they allege resulted from the negligence of the company while carrying him on its road. The defendant's demurrer to their declaration was sustained, and to reverse the judgment rendered thereon they sued out this writ of error.

The statute of Virginia, under which the action was brought, is, as to the question raised on the demurrer, identical with those of all

the other States, giving the right of recovery when the death is caused by such default or neglect as would have entitled the party injured to recover damages if death had not ensued.

The declaration, after alleging the carelessness of the officers of the company, by which a collision occurred between the train on which Scheffer was and another train, on the seventh day of December, 1874, proceeds as follows:—

“Whereby said sleeping-car was rent, broken, torn, and shattered, and by means whereof the said Charles Scheffer was cut, bruised, maimed, and disfigured, wounded, lamed, and injured about his head, face, neck, back, and spine, and by reason whereof the said Charles Scheffer became and was sick, sore, lame, and disordered in mind and body, and in his brain and spine, and by means whereof phantasms, illusions, and forebodings of unendurable evils to come upon him, the said Charles Scheffer, were produced and caused upon the brain and mind of him, the said Charles Scheffer, which disease, so produced as aforesaid, baffled all medical skill, and continued constantly to disturb, harass, annoy, and prostrate the nervous system of him, the said Charles Scheffer, to wit, from the seventh day of December, A. D. 1874, to the eighth day of August, 1875, when said phantasms, illusions, and forebodings, produced as aforesaid, overcame and prostrated all his reasoning powers, and induced him, the said Charles Scheffer, to take his life in an effort to avoid said phantasms, illusions, and forebodings, which he then and there did, whereby and by means of the careless, unskilful, and negligent acts of the said defendant aforesaid, the said Charles Scheffer, to wit, on the eighth day of August, 1875, lost his life and died, leaving him surviving a wife and children.”

The Circuit Court sustained the demurrer on the ground that the death of Scheffer was not due to the negligence of the company in the judicial sense which made it liable under the statute. That the relation of such negligence was too remote as a cause of the death to justify recovery, the proximate cause being the suicide of the decedent,—his death by his own immediate act.

In his opinion we concur.

Two cases are cited by counsel, decided in this court, on the subject of the remote and proximate causes of acts where the liability of the party sued depends on whether the act is held to be the one or the other; and, though relied on by plaintiffs, we think they both sustain the judgment of the Circuit Court.

The first of these is *Insurance Company v. Tweed*, 7 Wall. 44.

In that case a policy of fire insurance contained the usual clause of exception from liability for any loss which might occur “by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, explosion, earthquake, or hurricane.”

An explosion took place in the Marshall warehouse, which threw

down the walls of the Alabama warehouse, — the one insured, situated across the street from Marshall warehouse, — and by this means, and by the sparks from the Eagle Mill, also fired by the explosion, facilitated by the direction of the wind, the Alabama warehouse was burned. This court held that the explosion was the proximate cause of the loss of the Alabama warehouse, where the explosion occurred. The court said that no new or intervening cause occurred between the explosion and the burning of the Alabama warehouse. That if a new force or power had intervened, sufficient of itself to stand as the cause of the misfortune, the other must be considered as too remote.

This case went to the verge of the sound doctrine in holding the explosion to be the proximate cause of the loss of the Alabama warehouse; but it rested on the ground that no other proximate cause was found.

In *Milwaukee & St. Paul Railway Co. v. Kellogg*, 94 U. S. 469, the sparks from a steam ferry-boat had, through the negligence of its owner, the defendant, set fire to an elevator. The sparks from the elevator had set fire to the plaintiff's saw-mill and lumber-yard, which were from three to four hundred feet from the elevator. The court was requested to charge the jury that the injury sustained by the plaintiff was too remote from the negligence to afford a ground for a recovery.

Instead of this, the court submitted to the jury to find "whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which under the circumstances would not naturally follow from the burning of the elevator, and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected."

This court affirmed the ruling, and in commenting on the difficulty of ascertaining, in each case, the line between the proximate and the remote causes of a wrong for which a remedy is sought, said: "It is admitted that the rule is difficult. But it is generally held that, in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." To the same effect is the language of the court in *McDonald v. Snelling*, 14 Allen (Mass.) 290.

Bringing the case before us to the test of these principles, it presents no difficulty. The proximate cause of the death of Scheffer was his own act of self-destruction. It was within the rule in both these cases a new cause, and a sufficient cause of death.

The argument is not sound which seeks to trace this immediate

cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that "great first cause least understood," in which the train of all causation ends.

The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train.

His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him, and his death.

Judgment affirmed.

NEWCOMB v. BOSTON PROTECTIVE DEPARTMENT.

Supreme Court of Massachusetts, January, 1888. 146 Mass. 596.

TORT for personal injuries occasioned to the plaintiff, a cab-driver, by a collision between the cab and a wagon of the defendant.

At the trial in the Superior Court, before Blodgett, J., evidence was introduced tending to show that the defendant was incorporated under the St. of 1874, c. 61,¹ for the protection of life and property at fires in the city of Boston, and that the collision occurred while one of its wagons, with its regular complement of men, was responding to a fire alarm; that the wagon was proceeding along Washington Street in a northerly direction; that the cab, upon which the plaintiff was sitting, was one of several cabs standing in a line upon the easterly side of Washington Street between the easterly track of a street railway and the curbstone; that the plaintiff's cab and horse were not drawn up lengthwise of the street and as near as possible to the curbstone, but that the horse was facing the sidewalk at an angle so that the body of the cab projected eighteen or twenty inches into the street beyond the line of the other cabs; and that the wagon of the defendant was driven negligently into the cab, causing the accident.

The defendant asked the judge to instruct the jury as follows:

¹Section 3 of this statute is as follows:—"The officers and men of the Boston Protective Department, with their teams and apparatus, shall have the right of way, while going to a fire, through any street, lane, or alley in the city of Boston, subject to such rules and regulations as the city council and the fire commissioners may prescribe, and subject also to the rights of the Boston Fire Department; and any violation of the street rights of the Boston Protective Department shall be punished in the same manner as is provided for the punishment of violations of the rights of the Boston Fire Department in chapter three hundred and seventy-four of the Acts of eighteen hundred and seventy-three."

“1. If the plaintiff, at the time of the accident, was violating the ordinance of the city of Boston, to wit, ‘Every owner, driver, or other person having the care and ordering of a vehicle shall, when stopping in a street, place his vehicle and the horse or horses connected therewith lengthwise with the street, as near as possible to the sidewalk,’ that was an unlawful act, and he cannot recover in this action. 2. If that unlawful act contributed to cause the alleged injury, the plaintiff was not in the exercise of due care, and therefore he cannot maintain this action. 3. Under section 3, chapter 61, of the Acts of 1874, ‘The officers and men of the Boston Protective Department, with their teams and apparatus, shall have the right of way, while going to a fire, through any street, lane, or alley in the city of Boston,’ said defendant is not liable for an accident caused by the collision of one of its teams, while going to a fire, with a vehicle standing in the streets, in violation of either of the city ordinances. 4. If the plaintiff, at the time of the action, was violating the ordinance of the city of Boston, to wit, ‘Every driver of a vehicle shall remain near it while it is unemployed or standing in a street, unless he is necessarily absent in the course of his duty and business, and he shall so keep his horse or horses and vehicle as not to obstruct the streets,’ that was an unlawful act, and he cannot recover in this action. 5. If that unlawful act contributed to cause the alleged injury, the plaintiff was not in the exercise of due care, and therefore he cannot maintain this action.”

The judge refused to give these instructions, but instructed the jury as to the effect of a violation of the ordinance as to the position of a vehicle and horse while standing in a street, stating that the rule was applicable to both ordinances, as follows:

“Bearing in mind the provision of the regulation as to the position of a vehicle when not in motion, I instruct you as to the law, that if, at the time of the injury to the plaintiff, he allowed his carriage to stand in the street in violation of this ordinance, such violation is evidence of negligence on his part; and, if such negligence directly contributed to the injury, the plaintiff cannot maintain the action. It cannot be said, as matter of law, that the fact that the plaintiff was violating a city ordinance necessarily shows negligence that contributed to the injury. Whether the position of the plaintiff's horse and carriage, in violation of an ordinance, did or did not contribute to the injury, is a question of fact for the jury; and in determining this question, the jury will take into consideration all the surrounding facts and circumstances. . . . The plaintiff must prove that his position was not so carelessly taken as to contribute to the collision; and the fact that his position was in violation of the ordinance is not conclusive proof of negligence which contributed to the injury. Or, stating the general rule in a somewhat different form, the fact that the plaintiff is engaged in violating the law does not

prevent him from recovering damages of the defendant for an injury which the defendant could have avoided by the exercise of ordinary care, unless the unlawful act contributed proximately to produce the injury. . . . If, applying these rules, you are of the opinion that there was no negligence, in other words, no carelessness, on the part of the plaintiff, which directly contributed to the injury, then the plaintiff is entitled to maintain this action, if he proves another proposition; and as to that, the burden is upon him. And that proposition is, that the defendant's servants, in the care and management of this wagon, at the time the plaintiff was injured, were negligent."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

KNOWLTON, J. The plaintiff brought his action to recover for injuries received while sitting upon his cab, from the negligent driving of a wagon against it by a servant of the defendant corporation. There was evidence tending to show that, at the time of the accident, he was violating an ordinance of the city of Boston, by waiting in a street without placing his vehicle and horse lengthwise with the street, as near as possible to the sidewalk, and that this illegal conduct contributed to the injury. There was evidence applicable in like manner to another similar ordinance, which requires every driver of a vehicle standing in a street so to keep his horse or horses and vehicle as not to obstruct the streets.

As to the alleged violation of each of these ordinances, the defendant asked the court to instruct the jury as follows: "If that unlawful act contributed to cause the alleged injury, the plaintiff was not in the exercise of due care, and therefore he cannot maintain this action." The presiding judge declined to give this instruction, and gave none which we deem to be equivalent to it. He instructed the jury in these words: "If, at the time of the injury to the plaintiff, he allowed his carriage to stand in the street in violation of this ordinance, such violation is evidence of negligence on his part; and, if such negligence directly contributed to the injury, the plaintiff cannot maintain the action. It cannot be said, as matter of law, that the fact that the plaintiff was violating a city ordinance necessarily shows negligence that contributed to the injury." In another part of the charge it was indirectly intimated that, if the plaintiff's unlawful act contributed proximately to produce the injury, he could not recover, but it was nowhere expressly stated.

The question before us then is, whether or not the defendant was entitled to this instruction,—in other words, whether, if the plaintiff's unlawful act contributed to cause his injury, it was a bar to his recovery, or merely evidence of negligence which might or might not bar him, according to the view which the jury should take of his conduct as a whole, in its relation to the accident.

It has often been held that a violation of law at the time of an accident, by one connected with it, is evidence of his negligence, but not conclusive. *Hanlon v. South Boston Horse Railroad*, 129 Mass. 310. *Hall v. Ripley*, 119 Mass. 135. *Damon v. Scituate*, 119 Mass. 66. In recent times a large number of penal statutes have been enacted, in which the Legislature has seen fit to punish acts which are not mala in se, and sometimes when in a given case there is no actual criminal intent. On grounds of public policy, laws have been passed under which a person is bound to know the facts in regard to the subject with which he is dealing, when under possible circumstances ignorance would not be inconsistent with proper care. One who sells milk must know that it is not adulterated. An unlicensed person must know that what he sells is not intoxicating liquor. *Commonwealth v. Boynton*, 2 Allen, 160. And if in a possible case he trespasses in innocent ignorance, the law gives him no relief. He can only appeal to the sense of justice and the discretion of the public authorities to save him from the punishment which the law would inflict. It is obvious that in suits for negligence, if the contributing conduct of the plaintiff is to be considered as a whole, it may sometimes be found that he has not been guilty of actual negligence or fault, although he has violated the law. One element of his action may be neglect of a duty prescribed by a statute, when there are other concurring elements which show that his course was entirely justifiable.

As a general rule, in deciding a question in relation to negligence, each element which enters as a factor into one's act to give it character is to be considered in connection with every other, and the result is reached by considering all together. But, for reasons which will presently appear, illegal conduct of a plaintiff directly contributing to the occurrence on which his action is founded, is an exception to this rule. Such illegality may be viewed in either of two aspects: looking at the transaction to which it pertains as a whole, it may be considered as a circumstance bearing upon the question whether there was actual negligence; or looking at it simply in reference to the violated law, the act may be tried solely by the test of that law. In the latter aspect it wears a hostile garb, and an inquiry is at once suggested, whether the plaintiff, as a transgressor of the law, is in a position to obtain relief at the hand of the law. In the first view, the illegal conduct comes within the general rule just stated; in the second, it does not. This distinction has not always been observed. A plaintiff's violation of law has usually been discussed in connection with the subject of due care.

In *Bosworth v. Swansey*, 10 Met. 363, Chief Justice Shaw, after referring to the rule that a plaintiff must be free from "imputation of negligence or fault," says, in reference to unlawful travelling on the Lord's day, "This would be a species of fault on his part, which would bring him within the principle of the cases cited."

In *Jones v. Andover*, 10 Allen, 18, Chief Justice Bigelow says, "The term 'due care,' as usually understood in cases where the gist of the action is the negligence of the defendant, implies not only that a party has not been negligent or careless, but that he has been guilty of no violation of law in relation to the subject matter or transaction which constitutes the cause of action."

In *Steele v. Burkhardt*, 104 Mass. 59, an action for negligence in driving against the plaintiffs' horse, which was left standing in a street in violation of an ordinance, Chief Justice Chapman considers the general subject of the plaintiffs' due care, and then treats particularly the contention of the defendant that the plaintiffs were compelled to prove their violation of law in order to establish their case.

McGrath v. Merwin, 112 Mass. 467, was an action founded on the defendant's alleged negligence in starting the machinery of a mill, while the plaintiff was at work in the wheel-pit making repairs on the Lord's day, and Mr. Justice Morton, in delivering the opinion, deals with the case solely upon the principle that courts will not aid a plaintiff whose action is founded upon his own illegal act, and says, "The decisions in this Commonwealth are numerous and uniform to the effect that the plaintiff, being engaged in a violation of law, cannot recover, if his own illegal act was an essential element of his case as disclosed upon all the evidence." He further states the rule in such cases to be, that, "if the illegal act of the plaintiff contributed to his injury, he cannot recover; but though the plaintiff at the time of the injury was acting in violation of law, if his illegal act did not contribute to the injury, but was independent of it, he is not precluded thereby from recovering."

In *Davis v. Guarnieri*, 45 Ohio St. 470, Owen, C. J., states, as the second of three considerations upon which the doctrine of contributory negligence is founded, "the principle which requires every suitor who seeks to enforce his rights or redress his wrongs to go into court with clean hands, and which will not permit him to recover for his own wrong."

No case has been brought to our attention, and upon careful investigation we have found none, in which a plaintiff whose violation of law contributed directly and proximately to cause him an injury has been permitted to recover for it; and the decisions are numerous to the contrary. *Hall v. Ripley*, 119 Mass. 135; *Banks v. Highland Street Railway*, 136 Mass. 485; *Tuttle v. Lawrence*, 119 Mass. 276, 278; *Lyons v. Desotelle*, 124 Mass. 387; *Heland v. Lowell*, 3 Allen, 407; *Steele v. Burkhardt*, 104 Mass. 59; *Damon v. Scituate*, 119 Mass. 66; *Marble v. Ross*, 124 Mass. 44; *Smith v. Boston & Maine Railroad*, 120 Mass. 490. And it is quite immaterial whether or not a plaintiff's unlawful act contributing to his injury is negligent or wrong when considered in all its relations. He is precluded from

recovering, on the ground that the court will not lend its aid to one whose violation of law is the foundation of his claim. *Hall v. Corcoran*, 107 Mass. 251.

While this principle is universally recognized, there is great practical difficulty in applying it. The best minds often differ upon the question whether, in a given case, illegal conduct of a plaintiff was a direct and proximate cause contributing with others to his injury, or was a mere condition of it; or, to state the question in another way, appropriate to the reason of the rule, whether or not his own illegal act is an essential element of his case as disclosed upon all the evidence. Upon this point it is not easy to reconcile the cases. It has been unanimously decided that in *Gregg v. Wyman*, 4 Cush. 322, there was error in holding a plaintiff's illegal conduct to be an essential element of his case, when in fact it was merely incidental to it. *Hall v. Corcoran*, *ubi supra*. But whatever criticisms may have been made upon the decisions or the assumptions in certain cases, that illegal action of a plaintiff contributed to the result, or was to be treated as a concurring cause, or upon language in disregard of the distinction between a cause and a condition, there has been none upon the doctrine that, when a plaintiff's illegal conduct does directly contribute to his injury, it is fatal to his recovery of damages. *Baker v. Portland*, 58 Maine, 199; *Norris v. Litchfield*, 35 N. H. 271; *Sutton v. Wauwatosa*, 29 Wis. 21.

The plaintiff relies with great confidence upon the case of *Hanlon v. South Boston Horse Railroad*, 129 Mass. 310, in which the presiding judge at the trial refused to rule, that, "if the defendant was driving at a rate of speed prohibited by the ordinance of the city of Boston, and this speed contributed to the injury, this fact would itself constitute negligence on the part of the defendant, and would entitle the plaintiff to recover if he was in the exercise of due care," and his refusal was held right by this court. In giving the opinion, after pointing out that driving at a rate of speed forbidden by the ordinance might have occurred without fault of the driver, and might have been justified by circumstances authorizing the jury to find that there was no negligence, Mr. Justice Colt said, "It is not true that, if an unlawful rate of speed contributed to the injury, that alone would give the plaintiff a right to recover, if he was without fault." There are intimations, without adjudication, to the same effect, in *Wright v. Malden & Melrose Railroad*, 4 Allen, 283, and in *Lane v. Atlantic Works*, 111 Mass. 136. See also *Kirby v. Boylston Market Association*, 14 Gray, 249; *Heeney v. Sprague*, 11 R. I. 456; *Brown v. Buffalo & State Line Railroad*, 22 N. Y. 191; *Flynn v. Canton Co.*, 40 Md. 312.

But there is nothing in the language used in *Hanlon v. South Boston Horse Railroad* inconsistent with the principle which we have already stated. That decision related to the liability of a defendant.

It may be, where a penal statute does not purport to create a civil liability, or to protect the rights of particular persons, that a violation of it will not subject the violator to an action for damages, unless his act, when viewed in connection with all the attendant circumstances, appears to be negligent or wrongful. And at the same time courts may well hold that, in the sanctuary of the law, a violator of law imploring relief from the consequences of his own transgression will receive no favor.

The instruction requested in the case at bar would have become applicable only upon a finding by the jury that the plaintiff's unlawful act contributed to cause the injury. The jury may have so found; and we are of opinion that upon such a finding, irrespective of the question whether viewed in all its aspects his act was negligent or not, the court could not properly permit him to recover. The instruction, therefore, should have been given.

The court rightly refused the instruction requested, that the plaintiff could not recover if at the time of the accident he was violating the ordinance, and so doing an unlawful act. This request ignored the distinction between illegality which is a cause, and illegality which is a condition of a transaction relied on by a plaintiff, or between that which is an essential element of his case when all the facts appear, and that which is no part of it, but only an attendant circumstance. The position of a vehicle, which has been struck by another, may or may not have been one of the causes of the striking. Of course it could not have been struck if it had not been in the place where the blow came. But this is a statement of an essential condition, and not of a cause of the impact. The distinction is between that which directly and proximately produces, or helps to produce, a result as an efficient cause, and that which is a necessary condition or attendant circumstance of it. If the position of the plaintiff's vehicle was such as, in connection with ordinary and usual concurring causes, would naturally produce such an accident, that indicates that it contributed to it. But, even in that case, external causes may have been so exclusive in their operation, and so free from any relation to the position of the vehicle, as to have left that a mere condition, without agency in producing the result. What is a contributing cause of an accident is usually a question for a jury, to be determined by the facts of the particular case; and such it has been held to be in many cases like the one before us. *Damon v. Scituate*, 119 Mass. 66; *Hall v. Ripley*, 119 Mass. 135; *Welch v. Wesson*, 6 Gray, 505; *Spofford v. Harlow*, 3 Allen, 176; *White v. Lang*, 128 Mass. 598; *Baker v. Portland*, 58 Maine, 199; *Norris v. Litchfield*, 35 N. H. 271; *Sutton v. Wauwatosa*, 29 Wis. 21.

The defendant's third request for an instruction was rightly refused, for reasons which have already been stated. The statute referred to does not relieve the defendant from liability for negligence

to a plaintiff whose unlawful act or want of due care does not contribute to his injury. In the opinion of a majority of the court the entry must be

Exceptions sustained.

TERWILLIGER v. WANDS.

Court of Appeals of New York, March, 1858. 17 N. Y. 54.

ACTION for slander. The plaintiff proved by several witnesses that the defendant had said that the plaintiff had been guilty of lewd and unchaste conduct with one Mrs. Fuller.

One Neiper, a witness for the plaintiff, testified that the defendant had made the charge concerning the plaintiff, to him, Neiper, in May, 1852, and that he had repeated what the defendant said, to the plaintiff in the same month.

One La Fayette Wands testified for the plaintiff, that the defendant made the same charge concerning the plaintiff, to him, and that he told the plaintiff in June of 1852.

Neiper further testified that he was an intimate friend of the plaintiff's; that he was present at the time when La Fayette Wands communicated to the plaintiff what the defendant had said to him, Wands, and that the plaintiff felt bad, and that thereafter the plaintiff became melancholy and sick, so that he was obliged to hire additional help to carry on his farm. There was further testimony that from the middle of June, 1852, the plaintiff's health failed, so that he was unable to work, and that he required medical attendance.

At the close of the plaintiff's case the defendant moved for a nonsuit on the grounds: First, that the words were not spoken by the defendant to the plaintiff, nor authorized by him to be communicated to the plaintiff: Second, that there was no evidence that the damages, if any, were occasioned by the speaking of the words by the defendant. The court sustained the motion and entered judgment for the defendant and the plaintiff appealed. At the general term this judgment was affirmed, and the plaintiff appealed to this court.

STRONG, J. The words spoken by the defendant not being actionable of themselves, it was necessary in order to maintain the action to prove that they occasioned special damages to the plaintiff. The special damages must have been the natural, immediate and legal consequence of the words. Stark. on Sland. by Wend. 2d ed., 203; 3 Id. 62, 64; Beach v. Ranney, 2 Hill, 309; Crain v. Petrie, 6 Id. 523; Kendall v. Stone, 1 Seld. 14. Where words are spoken to one person and he repeats them to another, in consequence of which the party of whom they are spoken sustains damages, the repetition is, as a general rule, a wrongful act, rendering the person repeating them

liable in like manner as if he alone had uttered them. The special damages in such a case are not a natural, legal consequence of the first speaking of the words, but of the wrongful act of repeating them, and would not have occurred but for the repetition; and the party who repeats them is alone liable for the damages. *Ward v. Weeks*, 7 Bing. 211; *Hastings v. Palmer*, 20 Wend. 225; *Keenholts v. Becker*, 3 Denio, 346; *Stevens v. Hartwell*, 11 Met. 542. These views dispose of this case as to the right of action in respect to all the words but those spoken to the witness Neiper, as none of them were spoken by the defendant in the presence of the plaintiff, or communicated to the plaintiff by the witnesses to whom they were spoken by the defendant; and there is no proof as to the circumstances under which they were repeated by those witnesses. In the absence of evidence of those circumstances, the general rule, that a repetition of slanderous words is wrongful, applies; hence any damages which resulted from repeating them are a consequence of that wrong, and not a natural, immediate and legal effect of the original speaking of the words by the defendant.

In regard to the words spoken by the defendant to Neiper, it is proved that they were communicated by the latter to the plaintiff, and that Neiper was at the time an intimate friend of the plaintiff. This friendly relation, it is claimed on the part of the plaintiff, rendered the communication of Neiper to him proper; and, being so, it is insisted that the defendant is responsible for the consequences, in the same manner as if the words had been spoken directly to the plaintiff. There are several cases in which it is suggested that circumstances may exist which will justify the repetition of slanderous words, and that when repeated under such circumstances, and damages ensue, the first speaker may be liable in like manner as he would be if the injury had arisen from the words without the repetition. *Ward v. Weeks*, 7 Bing. 211; *Keenholts v. Becker*, 3 Denio, 346; *Olmsted v. Brown*, 12 Barb. 657; *McPherson v. Daniels*, 10 Barn. & Cress. 263. Occasions may doubtless occur where the communication of slanderous words by a person who heard them will be innocent; and it is certainly reasonable that when repeated on such an occasion and damages result, the first speaker should be held responsible for the damages, as flowing directly and naturally from his own wrong. It is not necessary in the present case to decide whether the proposition is law; for, assuming it to be so, and that illness and inability to labor constitute such special damage as will support an action, the evidence in this case wholly fails to show that the damages were a consequence of the words spoken by the defendant to Neiper. The proof is that they were mainly the result of the repetition of the words spoken to the witness Wands, and reports of other persons. It was not until a considerable time after the plaintiff was informed by Neiper what the defendant had said to the latter that he began to be

ill; and his illness commenced immediately after the communication to him of what had been said by La Fayette Wands. At that time the plaintiff had been informed of charges made by Fuller to the same effect, and it is a fair conclusion upon the proof that he then knew what the witness Wands says was fact, that "the story was all over the country." Under these circumstances it is impossible to conclude that what the defendant stated to Neiper produced the damages. *Stark. on Sland.* 205; *Vicars v. Wilcocks*, 8 East., 1; *Crain v. Petrie*, 6 Hill., 522.

But there is another ground upon which the judgment must be affirmed. The special damages relied upon are not of such a nature as will support the action. The action for slander is given by the law as a remedy for "injuries affecting a man's reputation or good name by malicious, scandalous and slanderous words, tending to his damage and derogation." 3 Bl. Com., 123; *Stark. on Sland.*, Prelim. Obs. 22-29; 1 Id. 17, 18. It is injuries affecting the reputation only which are the subject of the action. In the case of slanderous words actionable per se, the law, from their natural and immediate tendency to produce injury, adjudged them to be injurious, though no special loss or damage can be proved. "But with regard to words that do not apparently and upon the face of them import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened." 3 Bl. Com. 124. As to what constitutes special damages, Starkie mentions the loss of a marriage, loss of hospitable gratuitous entertainment, preventing a servant or bailiff from getting a place, the loss of customers by a tradesman; and says that in general whenever a person is prevented by the slander from receiving that which would otherwise be conferred upon him, though gratuitously, it is sufficient. 1 *Stark. on Sland.* 195, 202; *Cook's Law of Def.* 22-24. In *Olmsted v. Miller*, 1 Wend. 506, it was held that the refusal of civil entertainment at a public house was sufficient special damage. So in *Williams v. Hill*, 19 Wend. 305, was the fact that the plaintiff was turned away from the house of her uncle and charged not to return until she had cleared up her character. So in *Beach v. Ranney*, was the circumstance that persons, who had been in the habit of doing so, refused longer to provide fuel, clothing, &c. 2 *Stark. on Ev.*, 872, 873. These instances are sufficient to illustrate the kind of special damage that must result from defamatory words not otherwise actionable to make them so; they are damages produced by, or through, impairing the reputation.

It would be highly impolitic to hold all language, wounding the feelings and affecting unfavorably the health and ability to labor, of another, a ground of action; for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him; and his physi-

cal strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations. There must be some limit to liability for words not actionable per se, both as to the words, and the kind of damages; and a clear and wise one has been fixed by the law. The words must be defamatory in their nature; and must in fact disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result. In this view of the law words which do not degrade the character do not injure it, and cannot occasion loss.

. . . It necessarily follows from the rule that the words must be disparaging to character, that the special damage to give an action must flow from disparaging it. In the case last cited¹ the plaintiff actually suffered damage from the defendant's words by their bringing her into disrepute, but the words were not calculated to produce such a result and therefore the action would not lie. In the present case the words were defamatory, and the illness and physical prostration of the plaintiff may be assumed, so far as this part of the case is concerned, to have been actually produced by the slander, but this consequence was not, in a legal view, a natural, ordinary one, as it does not prove that the plaintiff's character was injured. The slander may not have been credited by or had the slightest influence upon any one unfavorable to the plaintiff; and it does not appear that any body believed it or treated the plaintiff any different from what they would otherwise have done on account of it. The cause was not adapted to produce the result which is claimed to be special damages. Such an effect may and sometimes does follow from such a cause but not ordinarily; and the rule of law was framed in reference to common and usual effects and not those which are accidental and occasional.

It is true that this element of the action for slander in the case of words not actionable of themselves — that the special damages must flow from impaired reputation — has been overlooked in several modern cases, and loss of health and consequent incapacity to attend to business held sufficient special damage. *Bradt v. Towsley*, 13 Wend. 253; *Fuller v. Fenner*, 16 Barb. 333; but these cases are a departure from principle and should not be followed. If such consequences were sufficient, it would not be necessary to allege in the complaint or prove that the words were spoken in the presence of a third person; if spoken directly to the plaintiff, in the presence of no one else, he might himself, under the recent law allowing parties to be witnesses, prove the words and the damages and be permitted to recover. It has been regarded as necessary to an action that the words should be published by speaking them in the presence of some person

other than the plaintiff, both in the case of words actionable and those not actionable. 1 Stark. on Sland., 360; 2 Id., 12; Cooke's L. of Def., 87.

Where there is no proof that the character has suffered from the words, if sickness results, it must be attributed to apprehension of loss of character, and such fear of harm of character, with resulting sickness and bodily prostration cannot be such special damage as the law requires for the action. The loss of character must be a substantive loss, one which has actually taken place.

It is not necessary to decide whether the doctrine which has some support in the books, that a husband may maintain an action for the slander of his wife producing sickness which prevents her attending to her ordinary business, if it conflicts with the principle now advanced, may be maintained upon some ground of exception to the general rule. It is doubtless true that in such cases the law regards more the loss of the wife's services, which alone entitles the husband to sue, than the influence of the words upon her character, and the husband has no control over the effect of the words; whereas, in other cases, the injury to character, as shown by the special damages, is principally regarded, and unusual extraordinary consequences may be assumed to be in some measure under the control of the party complaining. Still, the objection that special damages of that nature are not a fair, ordinary, natural result of such a wrong remains, and this objection appears to be alike applicable and entitled to the same force whether the action be brought by the husband of the party slandered. *Olmstead v. Brown*, 12 Barb. 657; *Keenholts v. Becker*, 3 Denio, 346.

ROOSEVELT, J., dissented; all the other judges concurring.

Judgment affirmed.

MURPHY & WIFE v. DEANE.

Supreme Court of Massachusetts, March, 1869. 101 Mass. 455.

ACTION for negligence. "It appeared that the defendants were teamsters, engaged in transporting merchandise and freight in Boston; that, at the time of the injury to Mrs. Murphy, their team, under the charge and control of Michael Quinlan, their servant, and consisting of a wagon and two horses, was backed up against the sidewalk, in front of the warehouse of Mixer & Whitman in Broad Street, and Quinlan was engaged in the duty of delivering a cask of oil into the warehouse, the weight of which cask was variously estimated by witnesses, from 1,700 to 3,000 pounds; that, for the purpose of removing the cask from the wagon into the warehouse, a pair of skids, from twelve to fourteen feet long, were placed by Quinlan from the

end of the wagon at the edge of the sidewalk, (being there about two feet from the surface of the sidewalk,) extending over the sidewalk, and into the warehouse door, over the threshold, (which was from eight to ten inches above the sidewalk,) the length of the skids within the warehouse beyond the threshold being variously estimated by witnesses at from six inches to two feet; and that the cask was to be rolled down these skids from the wagon into the warehouse."

There was evidence for the plaintiff that Mrs. Murphy, in passing up Broad Street upon the sidewalk, saw the team and the skids as above described; that as she approached the skids she saw three men, one of whom was between the skids and one at each end of the cask, who were ready to roll the cask upon the skids; that she attempted to go across the skids, when she was caught by the cask, thrown down, and her hip broken; and that she heard no warning against attempting to pass the skids. There was further evidence for the plaintiff that the men could not control the cask and that if a parbuckle had been used the cask could have been controlled by one man.

There was evidence for the defendant that the men had entire control of the cask and that one of the defendant's servants called out a warning to Mrs. Murphy; that the cask was unloaded in the usual manner of unloading casks of light weight.

The plaintiffs asked the judge to rule "that the question for the jury was, whether the injury was occasioned entirely by the negligence, or improper conduct of the defendant's servant, or whether the female plaintiff herself so far contributed to the misfortune, by her own negligence, or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on her part, the misfortune would not have happened; that in the first case the plaintiffs would be entitled to recover, and in the second they would not."

They further asked the judge to rule "that mere negligence or want of ordinary care and caution, will not disentitle the plaintiffs to recover, unless it be such that, but for that negligence, or want of ordinary care and caution, the misfortune could not have happened, nor if the defendants might, by the exercise of care on their part, have avoided the consequences of the neglect or carelessness of the female plaintiff."

"The judge did not instruct the jury in the terms requested by either party; but, among other things, instructed them that, to maintain the action, the plaintiffs must prove, in the first place, that the female plaintiff, at the time of the accident, was in the exercise of ordinary care; and in the second place, that the defendants were not in the exercise of ordinary care; that if the jury found that at the time of the accident the female plaintiff was guilty of negligence, or want of ordinary care, and this contributed to the accident, she would not be entitled to recover, although the jury might also find

that the defendants were guilty of negligence, or want of ordinary care; that the law would not calculate or measure the comparative negligence, or want of ordinary care of the two parties, if both were in fault, but if the female plaintiff's own negligence, or want of ordinary care, contributed to the accident, the plaintiffs could not recover."

The jury found a verdict for the defendants and the plaintiff excepted to the ruling of the court, and to the refusal to rule as requested.

WELLS, J. The instructions given to the jury, in regard to the conditions upon which liability of the defendants must depend, were correct, and sufficient for the case that was presented by the facts, and were carefully expressed and guarded. We do not understand that any objection is made to what they contain. The plaintiffs contend that they are not equivalent to the instructions prayed for; and that they are entitled to a new trial on account of that deficiency.

We are of opinion that whatever is contained in the instructions prayed for, beyond what is in those given, or inconsistent therewith, is not in accordance with the well established principles of law. The difference appears to be this. It is contended that contributory negligence on the part of the female plaintiff ought not to defeat the action, unless it should appear that, in the particular case, it did in fact contribute to such an extent that the injury could not or would not have occurred but for her negligence. The counter-proposition, which we think to be more nearly a true statement of the legal principle, is, that there can be no recovery unless it shall appear that the injury happened, or would have happened, irrespectively of any negligence on the part of the female plaintiff. This is necessarily involved in the general rule, which applies to all cases of this nature, to wit, that the plaintiff must show not only negligence on the part of the defendant, but due care on his own part. That the burden of proof rests upon these plaintiffs to maintain both of these points is clearly established by the authorities cited by the defendants; and rests, as we think, upon sound principle. The plaintiffs do not sustain that burden, if the proof leaves it in doubt whether or not the injury resulted in whole or in part from the fault of the female plaintiff.

The last part of the instructions prayed for suggests another question, which, in certain conditions of facts, may require careful consideration; to wit, how far the obligations and liabilities of one party are modified towards the other, after knowledge of a negligent exposure, by the latter, to danger from the acts or neglect of the former. In such case, what would otherwise have been mere negligence may become wilful or wanton wrong; or may take the place of the sole direct or proximate cause; the negligence of the other party being then regarded as a remote, and not a contributory cause. But no such question arises upon the facts of the present case.

The instructions of the court were all that were required by the facts, and the verdict is well warranted by the testimony. We should not consider further discussion necessary or appropriate, but that we observe that the prayer for instructions is framed in the precise terms of a statement by Mr. Justice Wightman in the case cited of *Tuff v. Warman*, 5 C. B. (N. S.) 573; which statement also forms the head-note of the report of that case.

The verdict in that case was for the plaintiff. The judge at nisi prius had instructed the jury that negligence of the plaintiff, contributing directly to the injury, would defeat his recovery. The only question was, whether the use of the term "directly" was not too restrictive, and likely to mislead the jury; and the verdict was sustained on the ground that other portions of the charge made it clear that the jury must have understood the term as distinguishing between proximate and remote causes. The real question in the case was, not so much the effect of contributory negligence, as whether the alleged negligence of the plaintiff was so remote as not to bear the character of contributory negligence. Throughout the discussion the general doctrine is recognized that negligence of the plaintiff, co-operating to produce the result, will defeat the action; that the negligence of the defendant must be the sole cause of the injury. It is so explained by Mr. Justice Willes in the case of *London, Brighton & South Coast Railway Co. v. Walton*, 14 Law Times, (N. S.) 253; S. C. Harr. & Ruth. 424; and so understood in *Scott v. Dublin & Wicklow Railway Co.* 11 Irish C. L. 377.

It is apparent that the statement taken from *Tuff v. Warman* entirely overlooks the practical application of the rule as a guide in the trial of a cause. It was probably made without reference to the burden of proof. It not only fails to take into account the well settled principle that the burden is upon the plaintiff to show due care on his own part, but, by its form, implies that contrary. We think, however, that the statement will be found to be faulty in substance, as well as in form. One of the propositions in this statement is, that "mere negligence, or want of ordinary care or caution, will not disentitle the plaintiff to recover, unless it be such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened." There is certainly nothing indicated in this proposition for the plaintiff to establish affirmatively. More than this; if it should appear that the negligence of the defendant was an adequate cause to produce the result, the plaintiff must recover, even though he was himself equally, or even to a greater degree than the defendant, in fault. If the case can be supposed in which both parties were equally in fault, the fault of each being equally proximate, direct, and adequate to produce the result, so that it might have occurred from the conduct of either without the fault of the other, there would then be a case of contributory negligence, for the consequence of

which neither could recover from the other. But upon the statement quoted from *Tuff v. Warman*, neither would be "disentitled," and therefore both could recover if both suffered injury, each from the other.

Every case in which the proof fails to show, or leaves it in doubt, which of two sufficient causes was the actual proximate cause of the injury, is practically such a case. It is manifest from this illustration, that, as a definition of the limits of the right to recover in such cases, the proposition referred to must be logically incorrect. Eliminating negatives from the first branch of the proposition, it is, that a plaintiff may recover in such cases, unless the misfortune could not have happened but for his own negligence. This, as we have seen, being stated affirmatively, is too broad, and not correct; although its supplement or negative counterpart is correct, as far as it extends, to wit, that he cannot recover if the misfortune could not have happened but for his own negligence.

In *Greenland v. Chaplin*, 5 Exch. 248, Chief Baron Pollock states the rule "that, when the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action." Except that, in form of statement, it leaves out of view the consideration of the burden of proof, this seems to us to be accurate, and in accordance with the current of authorities. See *Dowell v. General Steam Navigation Co.* 5 El. & Bl. 195; *Bridge v. Grand Junction Railway Co.* 3 M. & W. 244; *Johnson v. Hudson River Railroad Co.* 20 N. Y. 65; *Trow v. Vermont Central Railroad Co.* 24 Verm. 487; *Beers v. Housatonic Railroad Co.* 19 Conn. 536.

The statement in *Tuff v. Warman* proceeds thus: "Nor if the defendants might, by the exercise of due care on their part, have avoided the consequences of the neglect or carelessness of the plaintiff." This, as already suggested, may be correct as applied to a case like *Tuff v. Warman*, where the negligence of the plaintiff was in a certain sense remote, preceding the negligent conduct of the defendant. But where the negligent conduct of the two parties is contemporaneous, and the fault of each relates directly and proximately to the occurrence from which the injury arises, the rule of law is rather that the plaintiff cannot recover if by due care on his part he might have avoided the consequences of the carelessness of the defendant. *Lucas v. New Bedford & Taunton Railroad Co.* 6 Gray, 64. *Waite v. Northeastern Railway Co.* 9 El. & Bl. 719. *Robinson v. Cone*, 22 Verm. 213. Suppose the case of a collision upon a public highway; both parties careless and equally in fault, but either, by the exercise of proper care on his part, might have avoided the consequences of the carelessness of the other. By the proposition last quoted from *Tuff v. Warman*, each would be liable to the other, and each would be entitled to recover from the other, for whatever injuries he might have thus received.

We think it is manifest that the rule thus laid down in *Tuff v. Warman* is not the correct rule of law which governs ordinary cases of injury by negligence; but whenever there is negligence on the part of the plaintiff, contributing directly, or as a proximate cause, to the occurrence from which the injury arises, such negligence will prevent the plaintiff from recovery; and the burden is always upon the plaintiff to establish either that he himself was in the exercise of due care, or that the injury is in no degree attributable to any want of proper care on his part. *Trow v. Vermont Central Railroad Co.* 24 Verm. 487. *Birge v. Gardiner* 19 Conn. 507.

Exceptions overruled.

6. SPECIAL DAMAGE.

RATCLIFFE v. EVANS.

Court of Appeal of England, May, 1892. 2 Q. B. 524.

MOTION to enter judgment for the defendant, or for a new trial, by way of appeal from the judgment entered by Mr. Commissioner Bompas, Q. C., in an action tried with a jury at the Chester Summer Assizes, 1891.

The statement of claim in the action alleged that the plaintiff had for many years carried on the business, at Hawarden in the county of Flint, of an engineer and boiler-maker under the name of "Ratcliffe & Sons," having become entitled to the good-will of the business upon the death of his father, who, with others, had formerly carried on the business as "Ratcliffe & Sons;" that the defendant was the registered proprietor, publisher, and printer of a weekly newspaper called the "County Herald," circulated in Flintshire and some of the adjoining counties, and that the plaintiff had suffered damage by the defendant falsely and maliciously publishing and printing of the plaintiff in relation to his business, in the "County Herald," certain words set forth which imported that the plaintiff had ceased to carry on his business of engineer and boiler-maker, and that the firm of Ratcliffe & Sons did not then exist.

At the trial the learned commissioner allowed the statement of claim to be amended by adding that "by reason of the premises the plaintiff was injured in his credit and reputation, and in his said business of an engineer and boiler-maker, and he thereby lost profits which he otherwise would have made in his said business." The plaintiff proved the publication of the statements complained of, and that they were untrue. He also proved a general loss of business since the publication; but he gave no specific evidence of the loss of any particular customers or orders by reason of such publication. In answer to questions left to them by the commissioner, the jury found that the words did not reflect upon the plaintiff's character, and were

not libellous; that the statement that the firm of Ratcliffe & Sons was extinct was not published bona fide; and that the plaintiff's business suffered injury to the extent of £120 from the publication of that statement. The commissioner, upon those findings, gave judgment for the plaintiff, for £120, with costs.

The defendant appealed.

BOWEN, L. J. This was a case in which an action for a false and malicious publication about the trade and manufactures of the plaintiff was tried at the Chester assizes, with the result of a verdict for the plaintiff for £120. Judgment having been entered for the plaintiff for the sum and costs, the defendant appealed to this court for a new trial, or to enter a verdict for the defendant, on the ground, amongst others, that no special damage, such as was necessary to support the action, was proved at the trial. The injurious statement complained of was a publication in the "County Herald," a Welsh newspaper. It was treated in the pleadings as a defamatory statement or libel; but this suggestion was negatived, and the verdict of the jury proceeded upon the view that the writing was a false statement purposely made about the manufactures of the plaintiff, which was intended to, and did in fact, cause him damage. The only proof at the trial of such damage consisted, however, of evidence of general loss of business without specific proof of the loss of any particular customers or orders, and the question we have to determine is, whether in such an action such general evidence of damage was admissible and sufficient. That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it actual damage must be shown, for it is an action which only lies in respect of such damage as has actually occurred. It was contended before us that in such an action it is not enough to allege and prove general loss of business arising from the publication, since such general loss is general and not special damage, and special damage, as often has been said, is the gist of such an action on the case. Lest we should be led astray in such a matter by mere words, it is desirable to recollect that the term "special damage," which is found for centuries in the books, is not always used with reference to similar subject-matter, nor in the same context. At times (both in the law of tort and of contract) it is employed to denote that damage arising out of special circumstances of the case which, if properly pleaded, may be superadded to the general damage which the law implies in every breach of contract and every infringement of an absolute right: see *Ashby v. White*.¹

¹ 2 Ld. Raym. 938; 1 Sm. L. C. 9th ed. p. 268, per Holt, C. J.

In all such cases the law presumes that *some* damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights, and calls it general damage. Special damage in such a context means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial. But where no actual and positive right (apart from the damage done) has been disturbed, it is the damage done that is the wrong; and the expression "special damage," when used of this damage, denoted the actual and temporal loss which has, in fact, occurred. Such damage is called variously in old authorities, "express loss," "particular damage:" *Cane v. Golding*; ¹ "damage in fact," "special or particular cause of loss:" *Law v. Harwood*; ² *Tasburg v. Day*.³

The term "special damage" has also been used in actions on the case brought for a public nuisance, such as the obstruction of a river or a highway, to denote that actual and particular loss which the plaintiff must allege and prove that he has sustained beyond what is sustained by the general public, if his action is to be supported, such particular loss being, as is obvious, the cause of action; see *Iveson v. Moore*; ⁴ *Rose v. Groves*.⁵ In this judgment we shall endeavor to avoid a term which, intelligible enough in particular contexts, tends, when successively employed in more than one context and with regard to different subject-matter, to encourage confusion in thought. The question to be decided does not depend on words, but is one of substance. In an action like the present, brought for a malicious falsehood intentionally published in a newspaper about the plaintiff's business — a falsehood which is not actionable as a personal libel, and which is not defamatory in itself — is evidence to show that a general loss of business has been the direct and natural result admissible in evidence, and if uncontradicted, sufficient to maintain the action? In the case of a personal libel, such general loss of custom may unquestionably be alleged and proved. Every libel is of itself a wrong in regard of which the law, as we have seen, implies general damage. By the very fact that he has committed such a wrong, the defendant is prepared for the proof that some general damage may have been done. As is said by Gould, J., in *Iveson v. Moore*,⁶ in actions against a wrong-doer a more general mode of declaring is allowed. If, indeed, over and above this general damage, further particular damage is under the circumstances to be relied on by the plaintiff, such particular damage must of course be alleged and shown. But a loss of general custom, flowing directly and in the ordinary course of things

¹ Sty. 169.

² 8 Cro. Car. 140.

³ Cro. Jac. 484.

⁴ 1 Ld. Raym. 486.

⁵ 5 M. & G. 613.

⁶ 1 Ld. Raym. 486.

from a libel, may be alleged and proved generally. "It is not special damage" — says Pollock, C. B., in *Harrison v. Pearce*,¹ — "it is general damage resulting from the kind of injury the plaintiff has sustained." So in *Bluck v. Lovering*,² under a general allegation of loss of credit in business, general evidence was received of a decline of business presumably due to the publication of the libel, while loss of particular customers, not having been pleaded, was held rightly to have been rejected at the trial: see also *Ingram v. Lawson*.³ Akin to, though distinguishable in a respect which will be mentioned from, actions of libel are those actions which are brought for oral slander, where such slander consists of words actionable in themselves and the mere use of which constitutes the infringement of the plaintiff's right. The very speaking of such words, apart from all damage, constitutes a wrong and gives rise to a cause of action. The law in such a case, as in the case of libel, presumes, and in theory allows, proof of general damage. But slander, even if actionable in itself, is regarded as differing from libel in a point which renders proof of general damage in slander cases difficult to be made good. A person who publishes defamatory matter on paper or in print puts in circulation that which is more permanent and more easily transmissible than oral slander. Verbal defamatory statements may, indeed, be intended to be repeated, or may be uttered under such circumstances that their repetition follows in the ordinary course of things from their original utterance. Except in such cases, the law does not allow the plaintiff to recover damages which flow, not from the original slander, but from its unauthorized repetition: *Ward v. Weeks*;⁴ *Holwood v. Hopkins*;⁵ *Dixon v. Smith*.⁶ General loss of custom cannot properly be proved in respect of a slander of this kind when it has been uttered under such circumstances that its repetition does not flow directly and naturally from the circumstances under which the slander itself was uttered. The doctrine that in slanders actionable per se general damage may be alleged and proved with generality must be taken, therefore, with the qualification that the words complained of must have been spoken under circumstances which might in the ordinary course of things have directly produced the general damage that has in fact occurred. . . . From libels and slanders actionable per se, we pass to the case of slanders not actionable per se, where actual damage done is the very gist of the action. Many old authorities may be cited for the proposition that in such a case the actual loss must be proved specially and with certainty; *Law v. Harwood*.⁷ Many such instances are collected in the judgments in *Iveson v. Moore*,⁸

¹ 32 L. T. (O. S.) 298.

² 1 Times L. R. 497.

³ 6 Bing. N. C. 212.

⁴ 7 Bing. 211.

⁵ Cro. Eliz. 787.

⁶ 5 H. &

⁷ Cro. Car. 140.

⁸ 1 Ld. Raym. 486.

where, although there was a difference as to whether the general rule had been fulfilled in that particular kind of action on the case, no doubt was thrown on the principle itself. . . . Cases may here, as before, occur where a general loss of custom is the natural and direct result of the slander, and where it is not possible to specify particular instances of the loss.

Hartley v. Herring¹ is probably a case of the kind, although it does not appear from the report under what circumstances, or in the presence of whom, the slanderous words were uttered. . . . Slanders of title, written or oral, and actions such as the present, brought for damage done by falsehoods, written or oral, about a man's goods or business, are similar in many respects to the last-mentioned class of slanders not actionable in themselves. Damage is the gist of both actions alike, and it makes no difference in this respect whether the falsehood is oral or in writing; *Malachy v. Soper*.² The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of the sort has been insisted upon for centuries. . . . In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damages done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry. The rule to be laid down with regard to malicious falsehoods affecting property or trade is only an instance of the doctrines of good sense applicable to all that branch of actions on the case to which the class under discussion belongs. The nature and circumstances of the publication of the falsehood may accordingly require the admission of evidence of general loss of business as the natural and direct result produced, and perhaps intended to be produced. . . . In the case before us to-day, it is a falsehood openly disseminated through the press — probably read, and possibly acted on, by persons of whom the plaintiff never heard. To refuse with reference to such a subject-matter to admit such general evidence would be to misunderstand and warp the meaning of old expressions; to depart from, and not to follow, old rules; and, in addition to all this, would involve an absolute denial of justice and of redress for the very mischief which was intended to be committed. . . . In our opinion, therefore, there has been no misdirection and no improper admission of evidence, and this appeal should be dismissed with costs.

Appeal dismissed.

¹ 8 T. R. 130.

² *Ante*, p. 221.

SPADE *v.* LYNN AND BOSTON RAILROAD COMPANY.

Supreme Court of Massachusetts, January, 1897. 168 Mass. 285.

TORT, for personal injuries occasioned to the plaintiff by the alleged negligence of the defendant. The declaration alleged that while, on February 16, 1895, the plaintiff was a passenger in the defendant's car, and in the exercise of due care, "one of the defendant's agents or servants, in attempting to remove from said car a certain person claimed and alleged by said defendant's agent to be noisy, turbulent, and unfit to remain as a passenger in said car, conducted himself with such carelessness, negligence, and with the use of such unnecessary force, that said agent and servant, acting thus negligently, created a disorder, disturbance, and quarrel in said car, and thereby frightened the plaintiff and subjected her to a severe nervous shock, by which nervous shock the plaintiff was physically prostrated and suffered, and has continued to suffer, great mental and physical pain and anguish, and has been put to great expense."

At the trial in the Superior Court, before Mason, C. J., there was evidence tending to show that the accident complained of occurred while the plaintiff was being conveyed to her home in Chelsea upon a crowded car of the defendant company, after 10.30 P. M., on February 16, 1895.

The plaintiff testified in substance that two men somewhat intoxicated were allowed, during a part of the trip from Boston to Chelsea, to stand near her in the car, one of them in a position where he was leaning or lurching toward her in such a way that she was obliged to move to avoid him; that a controversy occurred between one of the intoxicated persons and the conductor about the payment of a fare, and that the conductor said to the intoxicated person, after some other conversation, that if he did not keep quiet he would throw him off the car, even if he broke his head; that as she neared the place where she was to leave the car . . . the conductor tried to eject one of the intoxicated men; that in doing so, some one lurched over her; that she became unconscious, but that she did not suffer any pain from the contact with the one who lurched upon her.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the nature of which appears in the opinion.

The case was argued at the bar in January, 1897, and afterwards was submitted on briefs to all the justices.

ALLEN, J. This case presents a question which has not heretofore been determined in this Commonwealth, and in respect to which the decisions elsewhere have not been uniform. It is this: whether in an action to recover damages for an injury sustained through the negligence of another, there can be a recovery for a bodily injury

caused by mere fright and mental disturbance. The jury were instructed that a person cannot recover for mere fright, fear, or mental distress occasioned by the negligence of another, which does not result in bodily injury; but that when the fright or fear or nervous shock produces a bodily injury, there may be a recovery for that bodily injury, and for all the pain, mental or otherwise, which may arise out of that bodily injury.

In *Canning v. Williamstown*, 1 Cush. 451, it was held, in an action against a town to recover damages for an injury sustained by the plaintiff in consequence of a defective bridge, that he could not recover if he sustained no injury to his person, but merely incurred risk and peril which caused fright and mental suffering. In *Warren v. Boston & Maine Railroad*, 163 Mass. 484, the evidence tended to show that the defendant's train struck the carriage of the plaintiff, thereby throwing him out upon the ground, and it was held to be a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even although the harm consists mainly of nervous shock. It was not therefore a case of mere fright, and resulting nervous shock.

The case calls for a consideration of the real ground upon which the liability or non-liability of a defendant guilty of negligence in a case like the present depends. The exemption from liability for mere fright, terror, alarm, or anxiety does not rest on the assumption that these do not constitute an actual injury. They do in fact deprive one of enjoyment and of comfort, cause real suffering, and to a greater or less extent disqualify one for the time being from doing the duties of life. If these results flow from a wrongful or negligent act, a recovery therefor cannot be denied on the ground that the injury is fanciful and not real. Nor can it be maintained that these results may not be the direct and immediate consequence of the negligence. Danger excites alarm. Few people are wholly insensible to the emotions caused by imminent danger, though some are less affected than others.

It must also be admitted that a timid or sensitive person may suffer not only in mind, but also in body, from such a cause. Great emotion may and sometimes does produce physical effects. The action of the heart, the circulation of the blood, the temperature of the body, as well as the nerves and the appetite, may all be affected. A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence, and if compensation in damages may be recovered for a physical injury so caused, it is hard on principle to say why there should not also be a recovery for the mere mental suffering when not accompanied by any perceptible physical effects.

It would seem therefore that the real reason for refusing damages

sustained from mere fright must be something different; and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule. The law must be administered in the courts according to general rules. Courts will aim to make these rules as just as possible, bearing in mind that they are to be of general application. But as the law is a practical science, having to do with the affairs of life, any rule is unwise if in its general application it will not as a usual result serve the purposes of justice. A new rule cannot be made for each case, and there must therefore be a certain generality in rules of law, which in particular cases may fail to meet what would be desirable if the single case were alone to be considered.

Rules of law respecting the recovery of damages are framed with reference to the just rights of both parties; not merely what it might be right for an injured person to receive, to afford just compensation for his injury, but also what it is just to compel the other party to pay. One cannot always look to others to make compensation for injuries received. Many accidents occur, the consequences of which the sufferer must bear alone. And in determining the rules of law by which the right to recover compensation for unintended injury from others is to be governed, regard must chiefly be paid to such conditions as are usually found to exist. Not only the transportation of passengers and the running of trains, but the general conduct of business and of the ordinary affairs of life, must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive, and are of ordinary physical and mental strength. If, for example, a traveller is sick or infirm, delicate in health, specially nervous or emotional, liable to be upset by slight causes, and therefore requiring precautions which are not usual or practicable for travellers in general, notice should be given, so that, if reasonably practicable, arrangements may be made accordingly, and extra care be observed. But, as a general rule, a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness. This limitation of liability for injury of another description is intimated in *Allsop v. Allsop*, 5 H. & N. 534, 538, 539. One may be held bound to anticipate and guard against the probable consequences to ordinary people, but to carry the rule of damages further imposes an undue measure of responsibility upon those who are guilty only of unintentional negligence. The general rule limiting damages in such a case to the natural and probable consequences of the acts done is of wide application, and has often been expressed and applied. *Lombard v. Lennox*, 155 Mass. 70. *White v. Dresser*, 135 Mass. 150. *Fillebrown v. Hoar*, 124 Mass. 580. *Derry v. Flitner*, 118 Mass. 131. *Milwaukee & St. Paul Railway v. Kellogg*, 94 U. S. 469, 475. *Wyman v. Leavitt*, 71 Maine, 227. *Ellis v. Cleveland*, 55 Vt. 358. *Phillips v. Dickerson*,

85 Ill. 11. *Hampton v. Jones*, 58 Iowa, 317. *Renner v. Canfield*, 36 Minn. 90. *Lynch v. Knight*, 9 H. L. Cas. 577, 591, 595, 598. *The Notting Hill*, 9 P. D. 105. *Hobbs v. London & Southwestern Railway*, L. R. 10 Q. B. 111, 122.

The law of negligence in its special application to cases of accidents has received great development in recent years. The number of actions brought is very great. This should lead courts well to consider the grounds on which claims for compensation properly rest, and the necessary limitations of the right to recover. We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without. The logical vindication of this rule is, that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright; and that this would open a wide door for unjust claims, which could not successfully be met. These views are supported by the following decisions. *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222.¹ *Mitchell v. Rochester Railway*, 151 N. Y. 107. *Ewing v. Pittsburg, Cincinnati, Chicago & St. Louis Railway*, 147 Penn. St. 40. *Haile v. Texas & Pacific Railway*, 60 Fed. Rep. 557.

In the following cases, a different view was taken. *Bell v. Great Northern Railway*, 26 L. R. (Ir.) 428. *Purcell v. St. Paul City Railway*, 48 Minn. 134. *Fitzpatrick v. Great Western Railway*, 12 U. C. Q. B. 645. See also *Beven, Negligence*, 77 et seq.

It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example, in cases of seduction, slander, malicious prosecution, or arrest, and some others. Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been in the actor's mind. *Lombard v. Lennox and Fillebrown v. Hoar*, already cited. *Meagher v. Driscoll*, 99 Mass. 281.

In the present case, no such considerations entered into the rulings or were presented by the facts. The entry therefore must be

Exceptions sustained.

¹ Post, p. 695.

WATSON *v.* DILTS.

Supreme Court of Iowa, April, 1902. 116 Iowa, 249.

THE case is stated in the opinion.

A demurrer to the declaration was sustained and the plaintiff appealed.

SHERWIN, J. The petition alleges that the plaintiff is a married woman, and that on the 9th day of February, she resided, with her husband and child, on a farm remote from the travelled highway; that in the night time of said day, at about the hour of 11 o'clock, and after she, her husband, and her child had gone to bed, the defendant wrongfully, surreptitiously, and stealthily entered her said home, and went upstairs to the second story thereof, as the plaintiff then believed to commit a felony; that the identity of the defendant was not known to her at the time she heard him enter the house and go upstairs, and that she called to her husband to follow him, which he did; that in her apprehension for her own, her child's, and her husband's life, from what appeared to her a threatened danger, she followed her husband up to the room where the defendant was found and where she found him and her husband in what appeared to her to be an encounter, and an assault upon her husband; that she became greatly terrified thereat, and was attacked with a violent nervous chill of such severity that her nervous system completely gave way, and she became prostrated, and was confined to her bed with threatened neurosis, or paralysis, and suffered great mental and physical pain for nearly six weeks, during all of which time she was confined to her bed, and unable to attend to her household duties. The demurrer to the petition is based on the ground that the damages claimed are too remote and speculative, and that the plaintiff seeks recovery for fright and injuries resulting therefrom without any physical injury to her which caused the fright. The petition alleges physical injuries resulting from the fright caused by the defendant, and the demurrer thereto raises the question whether recovery may be had for physical injuries so caused.

Many cases have been before the courts in which the question of a recovery for mental pain alone, and for physical disability produced by fright, unaccompanied by physical impact, have been decided; and the decisions on these questions are in conflict, though it is probably true that the numerical weight of authority denies the right of action. But the cases so holding are not in harmony as to the reasons given for denying the right of action; some of them hold that the injury is not the proximate result of the alleged negligent or wrongful act, while others refused a recovery for the reason that it is practically impossible to satisfactorily administer any other rule and serve the

purposes of justice. The latter rule is the one adopted in Massachusetts. *Spade v. Railroad Co.*, 168 Mass. 285.¹ We shall not take the time to review the cases in detail which hold to the doctrine that no recovery can be had. A large majority of them are cases in which the simple charge of negligence was made, and in many of them no claim was made for physical disability resulting from the fright. A review of some of the cases will be found in *Braun v. Craven*, 175 Ill. 401. See, also, note in *Ewing v. Railway Co.*, 147 Pa. 40. Our attention has not, however, been called to any case in which the facts averred are precisely parallel to the facts in this case, and in no case to which we have been cited, and in no case which our own investigation has discovered, have we found facts alleged which so strongly condemn the unlimited application of the rule contended for by the appellee as do the facts pleaded in the case at bar. This defendant, in the night time, stealthily and unbidden invaded the home of the plaintiff and her husband and family. When he entered the house and went to an upper room, she did not know who it was, nor his purpose and intent in thus breaking and entering their home. It was an unlawful and lawless trespass on his part, no matter whether he entered with the intent to steal the personal property of the inmates of the house or whether he was in quest of other game.

Nor does it matter, in our judgment, that the trespass was committed on property belonging to the husband. It was her home as well as that of her husband; her right to its peaceful and quiet enjoyment day or night was equal to that of her husband; and any unlawful entry or invasion thereof which produced physical injury to her was a wrong for which she ought to recover. Let us go a little further with the case, and suppose that his purpose had been to ransack the house, and steal therefrom; that he went in masked, and with a deadly weapon in his hand. His discovery there under such circumstances might well cause alarm to the boldest man, and, if it produced nervous prostration, and physical disability, the theory, no matter what its reason, that would say there was no actionable wrong, would be too fine spun and too cold for our sanction. Nor could it be said, under such circumstances, that the prostration resulting from the fright so caused was not the proximate or probable result of the defendant's act. "Proximate cause is probable cause; and the proximate consequence of a given act or omission, as distinguished from a remote consequence, is one which succeeds naturally in the ordinary course of things, and which, therefore, ought to have been anticipated by the wrongdoer." 1 Thompson, Negligence, 156. It is within the common observation of all that fright may, and usually does, affect the nervous system, which is a distinctive part of the physical system, and controls the health to a very great extent and that an entirely sound body is never found with a diseased nervous organization; consequently one who voluntarily causes a diseased condition of the

¹ Ante, p. 689.

latter must anticipate the consequences which follow it. The nerves being, as a matter of fact, a part of the physical system, if they are affected by fright to such an extent as to cause physical pain, it seems to us that the injury resulting therefrom is the direct result of the act producing the fright. *Spade v. Railroad Co.*, 168 Mass. 285; *Hill v. Kimball*, 76 Tex. Sup. 210; *Mack v. Railroad Co.*, 52 So. Ca. 323; *Purcell v. Railway Co.*, 48 Minn. 134; *Larson v. Chase*, 47 Minn. 307; *Mcagher v. Driscoll*, 99 Mass. 281; *Lombard v. Lennox*, 155 Mass. 70; *Mentzer v. Telegraph Co.*, 93 Iowa, 752.

It is undoubtedly true that the door should not be thrown wide open for trumped-up claims on account of injuries resulting from fright, and we do not intend to so open it in this case. Each case must, of necessity, depend on its own facts. We held in *Lee v. City of Burlington*, 133 Iowa, 356, that no recovery could be had for the death of a horse alleged to have been caused by fright, because death therefrom could not be anticipated, and hence it was not the proximate result of the defendant's negligence. In *Mahoney v. Dankwort*, 108 Iowa, 321, the question before us was not decided. That case was disposed of on the facts there presented, and was a case of simple negligence. The reasoning of the Massachusetts cases should not be applied to this case, for greater evil would result from a holding of no actionable wrong than can possibly follow the rule we announce. We do not concern ourselves with what the trial of this case may disclose, but hold a cause of action stated in the petition.

The demurrer should therefore have been overruled.

Reversed.

VICTORIAN RAILWAYS COMMISSIONERS *v.* COULTAS.

Privy Council of England, February, 1888. 13 A. C. 222.

APPEAL from an order of the Supreme Court (of Victoria) (Dec. 14, 1886), entering judgment for the plaintiffs in two several sums of £342 2s. and £400, and costs of action. The facts of the case and the proceedings in the action are stated in the opinion.

SIR RICHARD COUCH. The respondents brought a suit against the appellants in the Supreme Court of the colony of Victoria to recover damages for injuries sustained by the respondent Mary Coultas, through the negligence of a servant of the appellants, and expenses incurred by the respondent James Coultas, her husband, through her illness. The statement of claim stated that, through the negligence of the servant of the defendants in charge of a railway gate at a level crossing, the plaintiffs, while driving over the level crossing, were placed in imminent peril of being killed by a train; and, by reason of the premises, the plaintiff, Mary Coultas, received a severe shock and suffered personal injuries, and still suffered from delicate health

and impaired memory and eyesight. The defendants, by their defence, denied the allegations in the statement of claim, and further said they would contend that no cause of action was disclosed by it, as it was not stated that either the plaintiffs or their property were struck or touched by the train of the defendants; and, further, that the alleged damage arising from shock or fright, without impact, was too remote to sustain the action.

The facts proved at the trial before Mr. Justice Williams, a judge of the Supreme Court, and a jury, were that on or about the 8th of May, 1886, about nine in the evening, the respondents, together with John Wilson, a brother of the wife, were driving home in a buggy from Melbourne to Hawthorn, which is near Melbourne. They had to cross a level crossing on the line of railway from Melbourne to Hawthorn. When they came to it the gates were closed, and the gate-keeper came and opened the gates nearest to them and then went across the line to the gates on the opposite side. The respondents followed him, and had got partly on to the up line (the farther one) when a train was seen approaching on it. The gate-keeper directed them to go back, but James Coultas, who was driving, shouted to him to open the opposite gate, and went on. He got the buggy across the line so that the train, which was going at a rapid speed, passed close to the back of it, and did not touch it. As the train approached Mary Coultas fainted and fell forward in her brother's arms. The medical evidence showed that she received a severe nervous shock from the fright, and that the illness from which she afterwards suffered was the consequence of the fright. One of the plaintiffs' witnesses said she was suffering from profound impression on the nervous system, nervous shock, and the shock from which she suffered would be a natural consequence of the fright. Another said he was unable to detect any physical damage; he put down her symptoms to nervous shock.

The jury found that the defendants' servant negligently opened the gate and invited the plaintiffs to drive over the level crossing when it was dangerous to do so, and that the plaintiffs could not have avoided what had occurred by the exercise of ordinary care and caution on their part. And they assessed the male plaintiff's damages at £342 2s., and the female plaintiff's at £400, leave being granted to either side to move for judgment after the full Court had decided points reserved. The points reserved were:—

1. Whether the damages awarded by the jury to the plaintiffs, or either of them, are too remote to be recovered?

2. Whether proof of "impact" is necessary in order to entitle plaintiffs to maintain the action?

3. Whether the female plaintiff can recover damages for physical or mental injuries, or both, occasioned by fright caused by the negligent acts of the defendants?

The full Court, consisting of Mr. Justice Williams, and two other judges, answered that the damages awarded were not too remote to be recovered; that proof of "impact" was not necessary; and that the female plaintiff could recover damages for physical and mental injuries occasioned by the fright. Thereupon judgment was entered for the plaintiffs for the amounts awarded, and the present appeal is from that judgment. The defendants did not move for a new trial, and consequently they cannot now contend that there was contributory negligence on the part of the plaintiffs.

The rule of English law as to the damages which are recoverable for negligence is stated by the Master of the Rolls in *The Notting Hill*, 8 P. D. 105, a case of negligent collision. It is that the damages must be the natural and reasonable result of the defendants' act; such a consequence as in the ordinary course of things would flow from the act. The law would be the same in Victoria unless it has been otherwise enacted by the legislature, which it is not said it has been.

According to the evidence of the female plaintiff her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty, which now often exists in case of alleged physical injuries, of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims. The learned counsel for the respondents was unable to produce any decision of the English Courts in which, upon such facts as were proved in this case, damages were recovered. The decision of the Supreme Court of New York, which he referred to in support of his contention, was a case of a palpable injury caused by a boy, who was frightened by the defendant's violence, seeking to escape from it, and is like the case of *Sneesby v. Lancashire and Yorkshire Railway Company*, 1 Q. B. D. 42. It is remarkable that no precedent has been cited of an action similar to the present having been maintained or even instituted, and their Lordships decline to establish such a precedent. They are of opinion that the first question, whether the damages are too remote, should have been answered in the affirmative, and on that ground, without saying that "impact" is necessary, that the judgment should have been for the

defendants. They will therefore humbly advise Her Majesty to reverse the judgment for the plaintiffs, and to order judgment to be entered for the defendants, with the costs of the action and of the argument of the points reserved and the motion for judgment. The respondents will pay the costs of this appeal.

Judgment for defendant.

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